

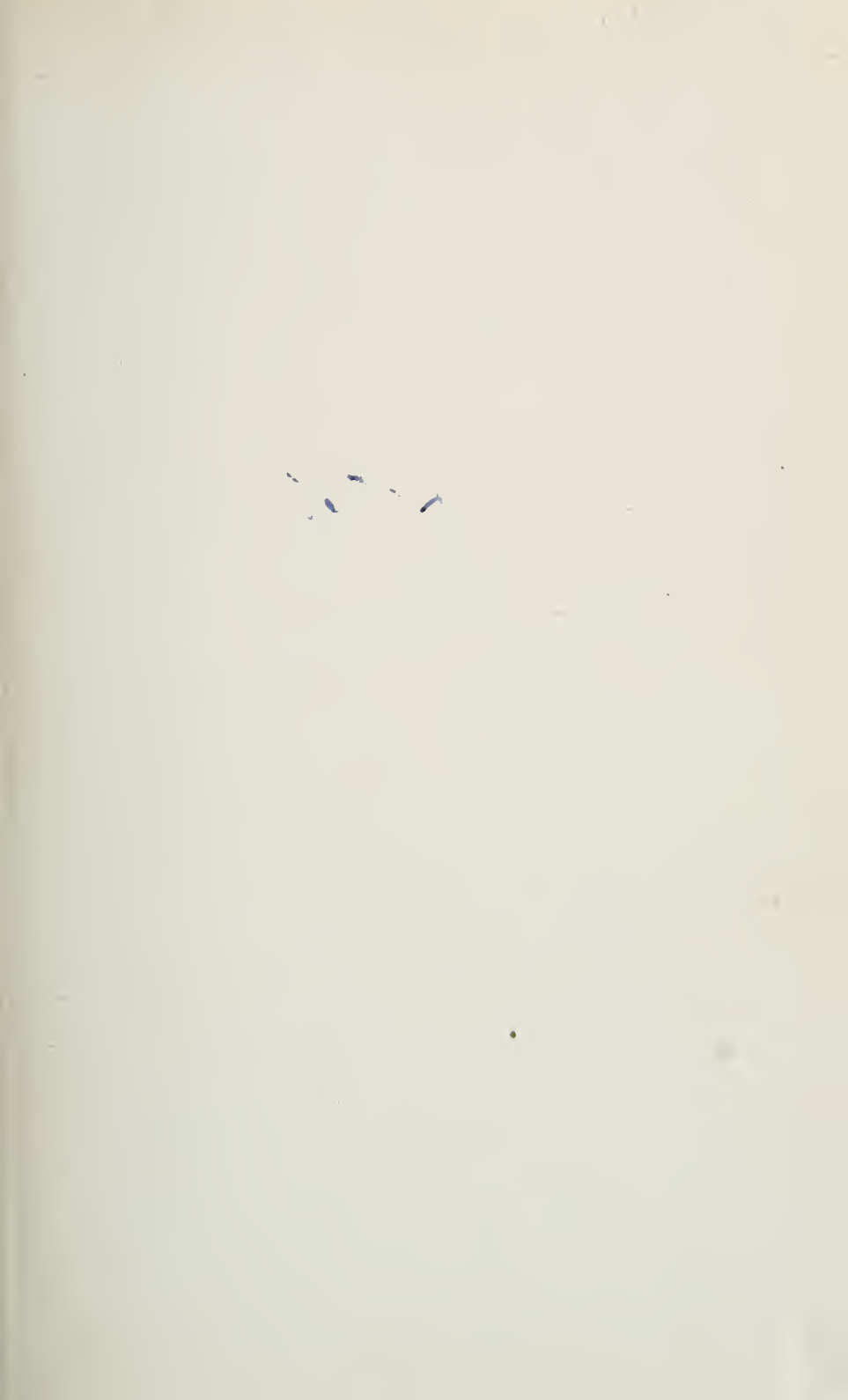
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No. 11396

IN THE

11.24.50

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

JAMES H. ADAMSON and MARION C. ADAMSON,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

OCT 10 1950

PAUL P. O'BRIEN,

CLERK

No. 11396

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

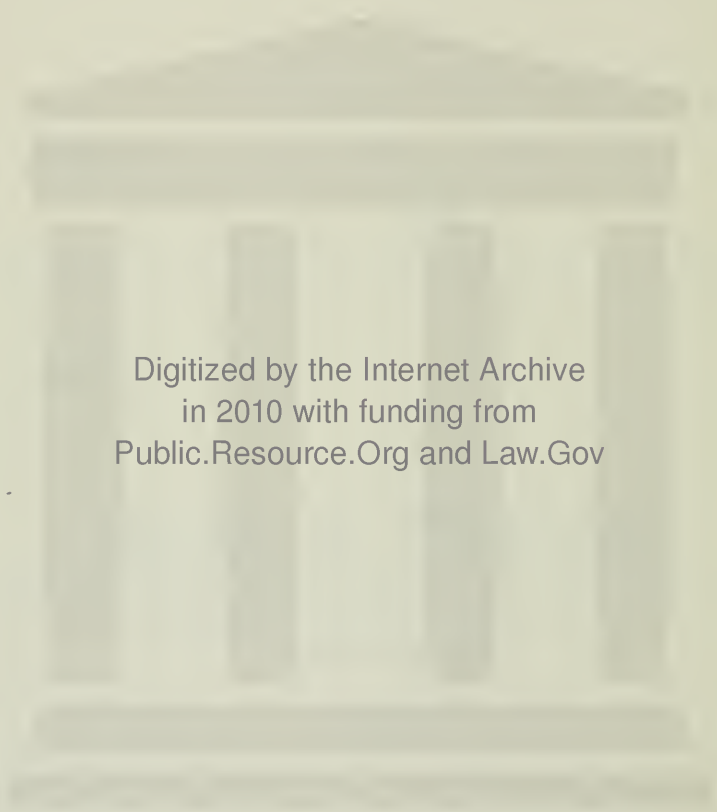
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

JAMES M. CARTER

Acting United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Assistants U. S. Attorney

EUGENE HARPOLE

Special Attorney, Bureau of Internal Revenue

600 U. S. Post Office and Court House Building

Los Angeles 12, Calif.

For Appellees:

ZAGON, AARON AND SANDLER

NATHAN SCHWARTZ

6253 Hollywood Boulevard

Los Angeles 28, Calif. [1*]

In the District Court of the United States in and for the
Southern District of California
Central Division

No. 4649 B. H.

JAMES H. ADAMSON and MARION C. ADAMSON,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Plaintiffs complain and allege:

I.

This action is brought to recover an overpayment of individual income taxes erroneously and illegally assessed and collected under the Internal Revenue Laws of the United States. It is instituted under the Revenue Laws of the United States.

II.

At all times herein involved, the plaintiffs herein have been, and still are, husband and wife; and the plaintiffs reside at Laguna Beach, Orange County, California, within the Central Division, Southern District, of the above entitled court.

III.

On or about March 14, 1941, plaintiffs filed with the Collector of Internal Revenue for the Third District of New York their joint federal income tax return for the calendar year 1940; and, upon said return, their joint income tax for the year [2] 1940 was shown to be the sum

of Two Thousand Four Hundred Eighty Nine and 15/100 Dollars (\$2,489.15). Concurrently with said return, plaintiffs paid to the said Collector the sum of Six Hundred Twenty-One and 29/100 Dollars (\$621.29) as the first installment of said joint income taxes. Thereafter, and on or about March 10, 1943, and subsequent to the disallowance of plaintiffs' claim for refund as hereinafter set forth, plaintiffs paid to the Collector of Internal Revenue for the Sixth District of California, upon said taxes, the further sum of One Thousand Dollars (\$1,000.00); and thereafter, and on or about April 8, 1943, plaintiffs paid to the Collector of Internal Revenue for the Sixth District of California, as a final payment upon said taxes, the sum of Eight Hundred Sixty Seven and 86/100 Dollars (\$867.86), together with interest in the amount of One Hundred Sixty-Eight Dollars and Eleven Cents (\$168.11), and One Dollar (\$1.00) for release of a lien, or a total payment of One Thousand Thirty-Six Dollars and Ninety-Seven Cents (\$1,036.97).

The amount of income tax reported by plaintiffs on the said return, and paid by them as aforesaid, was excessive and incorrectly computed and erroneously and illegally assessed and collected, in that: There was erroneously included in said return, as "Income—Rents and Royalties," an amount of Thirty Two Thousand Five Hundred Dollars (\$32,500.00). James H. Adamson sold to his brother all of his right, title and interest in and to a certain partnership between them, together with his interest in certain inventions and trademark. The sale was made on or about October 20, 1939. The aforesaid partnership was entered into in November, 1925. The assets sold were held for more than two (2) years before sale. The amount

reported in 1940 as "income from royalties" was in fact a long term gain on the sale of capital assets, and only fifty (50%) per cent thereof should have been taken into account.

When correctly computed, the joint income tax of [3] the plaintiffs for the said year 1940 was Eighty and 74/100 Dollars (\$80.74); and there was therefore, illegally assessed, and plaintiffs therefore overpaid, a tax for said year in the amount of Two Thousand, Four Hundred Eight and 41/100 Dollars (\$2,408.41), together with the interest and lien charge aforementioned.

V.

On or about August 24, 1942, plaintiffs duly filed, with the Collector of Internal Revenue for the Third District of New York their amended joint federal income tax return for the calendar year 1940, therein correctly showing their income tax liability for said year to be Eighty and 74/100 Dollars (\$80.74); and, concurrently with said amended return, plaintiffs duly filed their claim for refund of Five Hundred Forty and 55/100 Dollars (\$540.55), being the amount paid by plaintiffs to said Collector of Internal Revenue for the Third District of New York, upon the first installment of their tax for said year less the total amount of their correctly computed tax for said year, to-wit, Eighty and 74/100 Dollars (\$80.74). The grounds set forth in said claim as a basis for said refund were the same as those heretofore set forth in Paragraph IV of this Complaint, except that the capital asset therein and hereinabove referred to was in said claim incorrectly described as a "patent"; a correction of this error in description was duly made and filed

with the Collector of Internal Revenue for the Third District of New York on or about March 25, 1943.

VI.

On or about October 5, 1943, the aforesaid claim for refund was rejected and disallowed in full by the Commissioner of Internal Revenue, and notice of said action was, on or about October 5, 1943, mailed to plaintiffs by the Commissioner by registered mail.

VII.

On or about December 27, 1943, and after the payment of all of the plaintiffs' joint federal income tax for 1940 as shown [4] on their original return, all as hereinabove set forth in Paragraph III, plaintiffs duly filed with the Collector of Internal Revenue for the Sixth District of California their claim for a refund of said taxes in the amount of Two Thousand Four Hundred Eight and 41/100 Dollars (\$2408.41), being the entire amount of income taxes for 1940 which had theretofore been paid by plaintiffs, to-wit, the sum of Two Thousand Four Hundred Eighty Nine and 15/100 Dollars (\$2,489.15), less the correctly computed joint tax for said year, to-wit, the sum of Eighty and 74/100 Dollars (\$80.74). The grounds set forth in said claim filed on or about December 27, 1943, as a basis for such refund were the same as hereinbefore set forth in Paragraph IV of this Complaint.

VIII.

More than six (6) months has elapsed since the filing of the claim referred to in Paragraph VII of this Complaint, and the Commissioner of Internal Revenue has not allowed or approved the said claim in whole or in part, and the defendant has failed and refused, and still fails

and refuses, to refund to the plaintiffs, or either of them, the sums demanded in the aforesaid claims, or in either of them, or any portion thereof; plaintiffs are entitled to recover of the defendant the aforesaid sum of Two Thousand Four Hundred Eight Dollars and Forty-One Cents (\$2,408.41), together with the interest and lien charge referred to in Paragraph III of this Complaint, together with interest thereon at the rate prescribed by law.

IX.

Both the claim and corrected claim referred to in Paragraph V of this Complaint, and the claim referred to in Paragraph VII of this Complaint, were duly filed within three (3) years from and after the date of filing of the return referred to in Paragraph III of this Complaint. The claim referred to in Paragraph V of this Complaint was duly filed within two years from and after the [5] date of payment by the plaintiffs of the amount of tax therein involved, and the claim referred to in Paragraph VII of this Complaint was duly filed within two (2) years from and after the date of payment of the amount of tax therein involved.

Wherefore, plaintiffs pray for judgment against the defendant in the sum of Two Thousand Five Hundred Seventy-Seven Dollars and Fifty-Two Cents (\$2,577.52), together with interest on said sum at the rate prescribed by law, and for such other and further relief as the court may deem just and proper in the premises.

ZAGON, AARON AND SANDLER and
NATHAN SCHWARTZ

By Nathan Schwartz

[Verified.]

[Endorsed]: Filed Aug. 2, 1945. [7]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above entitled action and in answer to plaintiffs' complaint, denies generally each and every allegation therein contained.

CHARLES H. CARR

United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Assistant U. S. Attorneys

EUGENE HARPOLE, Special Attorney

Bureau of Internal Revenue

By George M. Bryant

Attorneys for Defendant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Nov. 5, 1945. [8]

[Title of District Court and Cause.]

AMENDED ANSWER

Comes now the defendant, leave of Court first having been had and obtained, and files this its Amended Answer to plaintiffs' complaint:

I.

Admits each and every allegation contained in Paragraph I thereof, except that it is denied that there has been any overpayment or erroneous and/or illegal assessment and/or collection of individual income taxes.

II.

Admits the allegations contained in Paragraph II thereof.

III.

Admits the allegations contained in Paragraph III thereof through line 16 on page 2 thereof.

Denies each and every allegation contained in Paragraph III thereof, commencing with line 17 on page 2 thereof.

V.

Admits the allegations contained in Paragraph V thereof, except that the [9] defendant alleges that the amended return and claim for refund described therein were filed by plaintiffs on June 13, 1941, instead of on August 24, 1942. Defendant further denies that the amended return correctly showed the income tax liability of plaintiffs for the year 1940 to be \$80.74, and it is further denied that the amount claimed in the said claim for refund was the amount paid by plaintiffs as the first installment of their

1940 income tax less the amount of their correctly computed tax for said year.

VI.

Admits the allegations contained in Paragraph VI thereof.

VII.

Admits the allegations contained in Paragraph VII thereof, except that defendant denies that the amount claimed in the said claim for refund was the total amount of income taxes paid by plaintiffs for 1940 less the correctly computed joint tax of plaintiffs for said year.

VIII.

Denies each and every allegation contained in Paragraph VIII thereof, except that defendant admits that no refund has been made of the amounts demanded in the said claim for refund. Defendant alleges that the claim for refund of \$2,408.41 filed by plaintiffs on December 27, 1942, was rejected by the Commissioner of Internal Revenue by registered letter dated July 26, 1945, addressed to the plaintiffs.

IX.

Admits the allegations contained in Paragraph IX thereof.

Wherefore, having fully answered, the defendant prays that it be hence dismissed with its costs in this behalf expended.

CHARLES H. CARR

United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Assistant U. S. Attorneys

EUGENE HARPOLE, Special Attorney
Bureau of Internal Revenue

By George M. Bryant
Attorneys for Defendant [10]

STIPULATION

It is hereby stipulated and agreed by and between the parties to the above entitled action, through their respective counsel undersigned, that the foregoing amended answer may be filed.

Dated this 17th day of December, 1945.

ZAGON, AARON AND SANDLER, and
NATHAN SCHWARTZ

By Ray Sandler
Attorneys for Plaintiffs

CHARLES H. CARR
United States Attorney

E. H. MITCHELL and
GEORGE M. BRYANT
Assistant U. S. Attorneys

EUGENE HARPOLE, Special Attorney
Bureau of Internal Revenue
By George M. Bryant

Attorneys for Defendant

It is so ordered this 21st day of December, 1945.

BEN HARRISON, Judge

[Endorsed]: Filed Dec. 21, 1945. [11]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is stipulated and agreed by and between each of the parties in the above entitled action, through their respective counsel, for the purposes of this action alone that the following facts are true:

I.

This action is brought to recover the sum of \$2,577.52, together with interest as prescribed by law, upon the theory that certain individual income taxes were erroneously and illegally assessed against and collected from the plaintiffs under the Internal Revenue laws of the United States.

II.

The plaintiffs herein at all times mentioned in the complaint were and still are husband and wife residing at Laguna Beach in Orange County, State of California, within the Central Division, Southern District of the above entitled Court.

III.

That on or about March 14, 1941, the plaintiffs filed with the Collector [12] of Internal Revenue for the Third District of New York their joint federal income tax return for the calendar year 1940; that said return was prepared upon a calendar year basis and showed a total gross income of \$42,525; that deductions were claimed against said income in the sum of \$21,569.55; that the tax indicated to be due thereon was shown to be \$2,489.15; that therewith plaintiffs paid to the Collector the sum of

\$621.29 as the first installment of said joint income taxes; that on or about March 10, 1943, and subsequent to a disallowance of plaintiffs' claim for refund described hereinafter plaintiffs paid to the Collector of Internal Revenue for the Sixth Collection District of California upon said taxes the sum of \$1,000, and to the same Collector on or about April 8, 1943, plaintiffs paid as a final payment upon said taxes the sum of \$867.86, together with interest in the amount of \$168.11, and \$1 for release of a lien filed by the Collector of Internal Revenue for the Sixth Collection District of California against the property of the plaintiffs; and that the total amount paid by plaintiffs by reason of their individual income and defense tax for the year 1940, including interest and lien charges, was the sum of \$2,658.26.

IV.

Plaintiffs claim that the correct amount of the tax due and owing from them was the sum of \$80.74. The United States determined that the amount of tax due is \$2,489.15. The difference between the computations of the plaintiffs and the computations of the Government result from the inclusion in said return of the sum of \$32,500 received by the plaintiffs from one Percy Adamson, the brother of James H. Adamson, one of the plaintiffs in this case under an agreement dated October 20, 1939, a copy of which is attached hereto marked Exhibit "C" and is incorporated herein as if set forth in full.

V.

That on or about June 13, 1941, the plaintiffs filed with the Collector of Internal Revenue for the Third District of New York claim for refund which was numbered

2,639,120 in the amount of \$540.55; that on October 5, 1943, the Commissioner of Internal Revenue rejected said claim for refund; that on or about December 27, 1943, plaintiffs filed a claim for refund in the sum of \$2,408.41, which was numbered 2,849,066 which claim was filed with the Collector of Internal [13] Revenue for the Sixth Collection District of California; that on July 26, 1945, the Commissioner of Internal Revenue rejected this claim for refund; and that on August 2, 1945, this action was filed.

VI.

The grounds stated in the claim for refund filed June 13, 1941, are as follows:

Original income tax return was filed showing net income of \$20,955.45. Due to error, profit on sale of patent was included as income from royalties instead of a long term gain. If correctly reported the total tax to be paid would amount to \$80.74 as per amended return filed. Since the sum of \$621.29 has been paid for the first quarterly payment on the amount erroneously reported, there has been an overpayment of \$540.55.

VII.

The grounds stated in the claim for refund filed December 27, 1943, are as follows:

Taxpayers filed a joint return for 1940 and erroneously reported a long term gain on the sale of capital assets as income from royalties. James Adamson sold to his brother all of his right, title and interest in and to a certain partnership between them, together with his interest in certain inventions and

trade mark. The sale was made on or about October 20, 1939. The aforesaid partnership was entered into in November, 1925. The assets sold were held for more than two years before sale. The amount reported in 1940 as income from royalties was in fact long term gain on the sale of capital assets and only 50% thereof should have been taken into account.

This claim was prepared by Forest W. Monroe & Associates from information furnished by the taxpayers. [14]

VIII.

That on or about the first day of November, 1925, James H. Adamson and Percy Adamson entered into an agreement to become partners at will under the firm name and style of Adamson Bros. Company, for the purpose of engaging in the business of developing and dealing in yarns and textiles, including the development of ideas in the field of special yarns, pursuant to an oral understanding that James H. Adamson would furnish sufficient capital to get started, and that both James H. Adamson and Percy Adamson would cooperate in the management of the business, with James H. Adamson exercising a general supervision and control of the business, and Percy Adamson devoting all of his time and attention to the conduct thereof, the profits to be shared equally between them.

IX.

That said co-partnership entered upon the transaction of business in November 1925, and that said copartnership was terminated on or about the month of December, 1932.

X.

That, in the year 1930, Percy Adamson conceived the idea of an elastic yarn and, on July 30, 1930, filed in the United States Patent Office an application for a patent thereon. That, between July 30, 1930, and June, 1931, experimental and development work in connection with said idea was conducted and, on June 11, 1931, a new application for a patent was filed by said Percy Adamson in the United States Patent Office, which application was a continuation, in part, of the application filed July 30, 1930. That United States Letters Patent No. 1,822,847, covering an elastic yarn, was issued on such application on September 9, 1931.

XI.

That said co-partnership paid the expense of prosecuting said patent applications and, in addition thereto, incurred liability for development and experimental expenses in connection therewith. That at all times prior to November 1, 1931, said invention was dealt with by James H. Adamson and Percy Adamson and was the property of said co-partnership. [15]

XII.

That the elastic yarn described in said patent and patent applications was and is known as "Lastex." That, on or about April 9, 1931, the said co-partnership filed in the United States Patent Office an application for the registration of a trademark for use in connection with the sale of such yarn, which trademark consisted of the word "Lastex" in a distinctive style of printing. That said trademark was duly registered on May 8, 1931, as the property of said co-partnership.

XIII.

That on or about April 10, 1931, Percy Adamson entered into two agreements, in writing, with the U. S. Rubber Company whereby in consideration of the license to use said invention and other consideration, including the agreement of said Percy Adamson to procure the assignment to the U. S. Rubber Company of said trademark, the U. S. Rubber Company agreed to pay to said Percy Adamson certain royalties and commissions. That said contracts were made simultaneously and as a single transaction.

XIV.

That on or about January 2, 1932, Percy Adamson and the said U. S. Rubber Company entered into two contracts, in writing, which were made in substitution and superseded the contracts made April 10, 1931.

XV.

That on or about July 7, 1931, in pursuance of said agreement made by Percy Adamson with the U. S. Rubber Company on April 10, 1931, the said co-partnership assigned to the U. S. Rubber Company the aforementioned trademark.

XVI.

That on or about November 1, 1931, Percy Adamson assumed the exclusive management of the partnership affairs without the consent of James H. Adamson. That on or about March 24, 1934, Percy Adamson repudiated the existence of the partnership or any partnership obligation.

XVII.

That after November 1, 1931, neither the partnership of Adamson Bros. Company nor James H. Adamson engaged in the business of developing and dealing [16] in yarns and textiles, or in the development of ideas in the field of special yarns.

XVIII.

That on or about May 14, 1934, James H. Adamson commenced an action in the Supreme Court of New York County against Percy Adamson for the dissolution of the partnership and for an accounting of the affairs and property of said partnership.

XIX.

That thereafter by order made and entered in said action, Harold R. Medina was duly appointed Referee to hear and determine the same. That on December 31, 1937, the said Harold R. Medina rendered his opinion in the said action and on January 8, 1938, he made his report in the said action wherein he set forth his findings of fact and conclusions of law and made his decision therein. That a copy of said decision is attached hereto, marked Exhibit "A," and by this reference made a part hereof.

XX.

That thereafter and on July 8, 1939, a judgment was filed and entered in the above entitled action in accordance with the decision hereinabove referred to. That a copy of said judgment is hereto attached, marked Exhibit "B," and by this reference made a part hereof.

XXI.

That by said decision and judgment it was adjudicated, among other things, that James H. Adamson and Percy Adamson were each entitled to an undivided one-half share, as tenants in common, to the contracts with the U. S. Rubber Company, hereinabove referred to, dated January 2, 1932. It was further directed that Percy Adamson be directed to execute and deliver to James H. Adamson an assignment of the undivided share of the said contracts, such assignment to be made by way of confirmation and further assurance of the title to such undivided share.

XXII.

That the said judgment provided, among other things, that Percy Adamson pay to James H. Adamson the sum of \$271,044.92, together with interest and costs. [17] That the obligation to pay said sum was discharged by agreements dated February 23, 1938, and September 11, 1939.

XXIII.

That on or about the 20th day of October, 1939, James H. Adamson entered into an agreement with Percy Adamson and the U. S. Rubber Company wherein and whereby the said James H. Adamson did sell, assign and transfer to Percy Adamson all of his right, title and interest in and to any and all assets which formerly belonged to the partnership hereinabove referred to, between James H. Adamson and Percy Adamson, under the firm name and

style of Adamson Bros. Company, consisting primarily of the following:

(a) The reversionary or other right of the certain trademark "Lastex" and the registration thereof.

(b) The certain invention for which the United States Letters Patent No. 1,822,847 was issued under date of September 8, 1931, together with all Letters Patent of foreign countries issued thereon, and all applications therefor.

(c) The two certain contracts, both dated January 2, 1932, between Percy Adamson and the U. S. Rubber Company, hereinabove described.

That, in consideration of the said sale, Percy Adamson agreed to pay to James H. Adamson the sum of \$215,000, without interest, as follows:

\$5,000 upon the execution of the agreement and \$210,000 in equal installments of \$2,500 each, beginning on December 1, 1939, and, thereafter, on the 1st day of each second month until the full balance of \$210,000 shall have been paid.

That a copy of said agreement is hereto attached, marked Exhibit "C" and by this reference made a part hereof.

XXIV.

Plaintiffs contend that the sums received under the said contract dated October 20, 1939, for the taxable years

involved constitute a capital gain, whereas the Commissioner of Internal Revenue determined that the amount received [18] under said contract constitutes ordinary income.

Dated at Los Angeles, California, this 8 day of January, 1946.

ZAGON, AARON AND SANDLER and
NATHAN SCHWARTZ

By Ray Sandler

Attorneys for Plaintiffs

CHARLES H. CARR

United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Assistant U. S. Attorneys

EUGENE HARPOLE, Special Attorney

Bureau of Internal Revenue

By George M. Bryant

Attorneys for Defendant [19]

[EXHIBIT "A"]

SUPREME COURT : NEW YORK COUNTY

_____X

James H. Adamson,

Plaintiff,

– against –

Percy Adamson,

Defendant,

and

Superior Seating Company, Inc.,

Defendant,

DECISION

_____X

#19023/1934

Thomas Adamson,

Plaintiff,

– against –

Superior Seating Company, Inc.,

Lillian Mandel and Jacob Klausner,

Defendants.

and

James H. Adamson,

Defendant.

_____X

The issues in the above entitled action with respect to which a new trial was ordered by an order of the Appellate Division, First Department, entered February 9, 1937, upon which judgment was entered in the Office of the Clerk of this Court on February 11, 1937, having been duly referred to the undersigned as Referee to hear and determine, by order made at Special Term, Part III of this Court, dated the 19th day of March 1937, upon the consent of all parties to the action; and the said order of

the Appellate Division and the judgment entered thereon having thereafter been resettled, and the issues with respect to which a new trial was ordered by said resettled order of the Appellate Division having thereafter been referred to the undersigned as Referee to hear and determine, by order made at Special Term, Part III of this Court, dated the 4th day of March 1937, likewise upon the consent of all the parties to the action; and the account of the defendant Percy Adamson having been filed with the Referee on or about the 15th day of April 1937; and objections of the plaintiff James H. Adamson to said account having been filed with the Referee on or about the 26th day of April 1937; and before proceeding to hear testimony upon said reference the Referee having duly taken the statutory oath; and the allegations and proofs of the parties having been taken at hearings held on March 2, 1937, March 10, 1937, March 31, 1937, April 7, 1937, April 12, 1937, April 15, 1937, April 20, 1937, April 21, 1937, April 28, 1937, May 4, 1937, May 6, 1937, May 11, 1937, May 13, 1937, May 25, 1937, May 26, 1937, June 1, 1937, June 3, 1937, June 8, 1937, June 9, 1937, June 10, 1937, June 16, 1937, June 17, 1937, June 24, 1937, September 24, 1937, October 4, 1937, October 8, 1937, October 19, 1937, October 20, 1937, October 21, 1937 and October 22, 1937.

And the Appellate Division by said resettled order filed March 15, 1937, having duly made findings of fact and conclusions of law including the following:

“Findings of Fact

“First: That on or about the 1st day of November, 1925, James H. Adamson and Percy Adamson entered into an agreement to become partners at will

under the firm name and style of Adamson Bros. Company for the purpose of engaging in the business of developing and dealing in yarns and textiles, including the develop- [21] ment of ideas in the field of special yarns, pursuant to an oral understanding that James H. Adamson would furnish sufficient capital to get the business properly started, and that both James H. Adamson and Percy Adamson would co-operate in the management of the business, with James H. Adamson exercising a general supervision and control of the business and Percy Adamson devoting all of his time and attention to the conduct thereof, the profits to be shared equally between them.

“Second: That the said copartnership entered upon the transaction of business as aforesaid in November, 1925.

“Third: That, pursuant to the said partnership agreement and various modifications thereof, James H. Adamson and Percy Adamson conducted said business until on or about November 1, 1931, when without the consent of James H. Adamson Percy Adamson assumed exclusive management of the partnership affairs; and that on or about March 24th, 1934 Percy Adamson repudiated any partnership obligation.”

“Conclusion of Law

“First: That an accounting by the parties in respect of the assets of the copartnership found shall be taken and stated.”

Now, after hearing Neilson Olcott, Esq., of counsel for James H. Adamson, plaintiff in the first above entitled action and a defendant in the second above entitled action, and Charles H. Tuttle, Esq., and George Thoms, Esq., of counsel for Percy Adamson, a defendant in the first above entitled action; and Robert P. Levis, Esq., of counsel for Superior Seating Company, a defendant in the first above entitled action and for Thomas Adamson, plaintiff in the second above entitled action, and due deliberation having been had thereon, the undersigned hereby decides and finds as follows:

FINDINGS OF FACT

1. That at various times between 1926 and 1930 the [22] defendant Percy Adamson represented to the plaintiff James H. Adamson and others that he had conceived novel ideas of commercial value relating to yarns some of which might be exploited as secret processes or by means of patents; that all such ideas were dealt with by the plaintiff James H. Adamson and the defendant Percy Adamson as the property of the said copartnership.

2. That on or about May 24, 1928, the defendant Percy Adamson by an agreement in writing purported to grant to Wabasso Cotton Mills the exclusive license to use in the dominion of Canada a secret process invented by Percy Adamson for mercerizing yarn in consideration of certain royalties to be paid to said Percy Adamson; that pursuant to said agreement said Wabasso Cotton Mills paid royalties of \$11,250.00, all of which were dealt with by the plaintiff James H. Adamson and the defendant Percy Adamson as the property of the said copartnership.

3. That in the year 1930 the defendant Percy Adamson conceived the idea of an elastic yarn and on July 30, 1930 filed in the United States Patent office an application for a patent thereon; that between July 1930 and June 1931, experimental and development work in connection with said idea was conducted and on June 11, 1931, a new application for a patent was filed by said Percy Adamson in the United States Patent Office, which application was a continuation in part of said application filed July 30, 1930; that United States Letters Patent No. 1,822,847 covering an elastic yarn were issued on such application on September 9, 1931.

4. That the said copartnership paid the expenses of prosecuting said patent applications and in addition thereto incurred liability for development and experimental expenses in connection therewith amounting to more than \$10,000.

5. That at all times prior to November 1, 1931, the said invention was dealt with by the plaintiff James H. Adamson and the defendant Percy Adamson as the property of said copartnership.

6. That the elastic yarn described in said patent and patent applications was and is known as "Lastex"; that on or about April 9, 1931, the said copartnership filed in the United States Patent Office an application for the registration of a trade-mark for use in connection with the sale of such yarn, which trade-mark consisted of the word "Lastex" in a distinctive style of printing; that said trade-mark was duly registered on May 8, 1931, as the property of said copartnership.

7. That on or about April 10, 1931, the defendant Percy Adamson entered into two agreements in writing

with the United States Rubber Company, whereby in consideration of a license to practice said invention and other consideration including the agreement of said Percy Adamson to procure the assignment to the United States Rubber Company of said trade-mark, the United States Rubber Company agreed to pay to said Percy Adamson certain royalties and commissions; that said contracts were made simultaneously and as a single transaction.

8. That payment was made by the United States Rubber Company pursuant to said contracts dated April 10, 1931, covering commissions earned between June 1931 and December 1931, and all such payment was dealt with by the plaintiff James H. Adamson and the defendant Percy Adamson as the property of said copartnership. [24]

9. That on or about January 2, 1932, the defendant Percy Adamson and the said United States Rubber Company entered into two contracts in writing, copies of which are hereto annexed marked respectively Exhibits "A" and "B"; that said contracts were made simultaneously and as a single transaction; that said contracts were made in substitution for and superseded the said contracts made April 10, 1931.

10. That on or about July 7, 1931, in pursuance of said agreement made by defendant Percy Adamson with the United States Rubber Company on April 10, 1931, the said copartnership assigned to the United States Rubber Company the trade-mark aforesaid.

11. That James H. Adamson, Percy Adamson and Thomas Adamson are brothers.

1. That on or about June 21, 1932, defendant Percy Adamson represented to the plaintiff James H. Adamson

that he would apply the interest of James H. Adamson in the business of said copartnership to paying or securing the payment of indebtedness of said James H. Adamson to American Seating Company, part of which indebtedness was represented by a note in the principal amount of \$100,000. made by said James H. Adamson and his wife Minnie C. Adamson. That at the time said representation was made the defendant Percy Adamson was in possession of substantial profits of said copartnership distributable to said James H. Adamson, and at all times thereafter was in possession of profits distributable to James H. Adamson, the amount of which will appear from the account taken and stated herein.

13. That at all times after August 1, 1932, the American Seating Company held as collateral security for the said note made by James H. Adamson and Minnie G. Adamson [25] the following:

- 29 bonds of Larchmont Shores, Inc., of the face value of \$1,000. each
- 86 shares of stock without par value 30 Post Road Realty Corporation
- 67 shares without par value of Beldale Realty Corporation
- 80 shares of stock of Directors Building Corporation Preferred Stock, ctf. No. P119
- 40 Directors Building Corporation Class "B" non-voting common stock, ctf. No. B131
- 60 Securities Conversion Company, Inc., Preferred Stock, ctf. No. 120

- 30 Securities Conversion Company, Inc., common stock, ctf. No. 95
- 25 Security Associates, Inc., Preferred stock, ctf. No. 300
- 25 Security Associates, Inc., Common stock, ctf. No. 435
- \$29,000 Larchmont Shores, Inc., debenture bonds
- 86 30 Post Road Realty Corporation common stock
- 50 Trading and Reorganizing Corporation \$3.00 Preferred stock
- 50 Trading and Reorganizing Corporation Common stock

Mortgage made by Hesselton Realty Corporation to Larchmont Shores, Inc., given to secure the sum of \$4,147.50, dated November 2, 1928, covering premises known as lots Nos. 58, 59 and 60, in block 106A, Village of Larchmont, Town of Mamaroneck, Westchester County, N. Y., as shown on a certain map entitled "Second Amended Map of Larchmont Shores, Section No. 3, Larchmont, Westchester County, N. Y.,"

Mortgage made by Hesselton Realty Corporation to Larchmont Shores, Inc., given to secure the sum of \$4,147.50, dated November 2, 1928, covering premises known as lots Nos. 61, 62 and 63, in block 106A, Village of Larchmont, Town of Mamaroneck, Westchester County, N. Y., as shown on a certain map entitled "Second Amended Map of Larchmont Shores, Section No. 3, Larchmont, Westchester County, N. Y.," dated August 20, 1928.

Mortgage made by Howell C. Perrin to Larchmont Shores, Inc., given to secure the sum of \$8,595.00 dated January 4, 1928, covering premises as follows: Lots 134, 135, 136 and 137 in Block 108, Village of Larchmont, Town of Mamaroneck, Westchester County, N. Y., as shown on a map entitled "Amended Map of Larchmont Shores, Section No. 3, Larchmont, Westchester, N. Y." survey by Guy Vroman, C. E., October 20, 1927.

100 Shares of the common stock of Superior Seating Company, Inc., a New York corporation. [26]

Second mortgage in the principal amount of \$20,000., on the residence property occupied by the said James H. Adamson in the Village of Larchmont, Town of Mamaroneck, County of Westchester, State of New York, known as the Cedar Island property.

• 14. That between August 1, 1932 and March 1, 1934, said Percy Adamson paid to the American Seating Company on behalf of James H. Adamson, the sum of \$35,000.

15. On or about March 4, 1935, said Percy Adamson and Thomas Adamson, plaintiff in the second above entitled action, fraudulently conspired and agreed that said Percy Adamson should accept an offer made by the American Seating Company to sell the said \$100,000. note made by said James H. Adamson and the said Minnie C. Adamson with the collateral security therefor, together with all of the right, title and interest of American Seating Com-

pany in and to certain written agreements made by the American Seating Company as follows:

- (i) on August 1, 1932 with James H. Adamson and Superior Seating Company, Inc.
- (ii) on August 9, 1932 with Percy Adamson
- (iii) on July 14, 1933 with Percy Adamson
- (iv) on July 14, 1933 with James H. Adamson

subject, however, to certain exceptions, qualifications and reservations as set forth in an agreement in writing between American Seating Company and Thomas Adamson, dated March 4, 1935, a copy of which is hereto annexed and marked Exhibit "C," for the sum of \$40,000., payable as follows:

\$5000. in cash and the balance in six promissory notes made by said Thomas Adamson and endorsed by said Percy Adamson, as follows:

<u>Dated</u>	<u>Due</u>	<u>Amount</u>	
3/4/35	7/20/35	\$5,000.00	.
3/4/35	10/20/35	5,000.00	
3/4/35	1/20/36	5,000.00	
3/4/35	4/20/36	5,000.00	
3/4/35	7/20/36	7,500.00	
3/4/35	10/20/36	7,500.00	[27]

and that when so purchased said note and collateral should be delivered to said Thomas Adamson with the purpose of creating the false appearance that said Thomas Adamson was the owner and holder thereof in order to prevent the said James H. Adamson from offsetting against said note his claims against said Percy Adamson arising out

of the said copartnership. That pursuant to said conspiracy said note and collateral were so purchased by said Percy Adamson and delivered to said Thomas Adamson who holds the same as the agent of said Percy Adamson.

16. That on or about March 15, 1935, said Percy Adamson and said Thomas Adamson, pursuant to said conspiracy caused a pretended sale of the collateral for said note to be held, pursuant to which said collateral was delivered to said Thomas Adamson in consideration of said Thomas Adamson crediting on the said note the sum of \$1,000.

17. That on June 5, 1935, there was received in satisfaction of said second mortgage on the said residence property known as the Cedar Island property the sum of \$19,729.73; that by an agreement in writing between said Thomas Adamson and the said James H. Adamson said sum was deposited in The National City Bank of New York, subject to the joint control of the attorneys for the said James H. Adamson and the said Thomas Adamson, to be held in escrow pending the determination in this action of the equitable ownership of said second mortgage, on the making of which determination it was agreed between the parties that said sum should be paid to the party held to be equitably entitled thereto.

18. That on or about July 5, 1935, said Thomas Adamson obtained a judgment against the said Minnie C. Adamson on said note in Supreme Court, Kings County, in the amount of \$105,727.05 and on May 20, 1937, obtained an additional judgment against said Minnie C. Adamson for costs on affirmance of an appeal from said judgment in the amount of \$56.20. [28]

19. That the account submitted by the defendant Percy Adamson herein is incorrect in the following particulars:

(a) Commissions and royalties earned after November 1, 1931, from the United States Rubber Company pursuant to said four contracts dated April 10, 1931 and January 2, 1932, are not accounted for. The total amount of said royalties earned up to and including September 30, 1937 was \$406,868.95 and the total amount of said commissions earned up to and including December 31, 1936, plus the twelve monthly retainer payments of \$1,000.00 each for the year 1937, was \$191,044.76, of which \$7,807.94 is included in Percy Adamson's account herein, making the total additional amount of royalties and commissions to be accounted for \$590,825.77.

(b) Payments shown by the books to have been received by Adamson Brothers Company from Wabasso Mills as earnings of the Partnership, amounting to \$11,250.00 are erroneously credited to the defendant Percy Adamson.

(c) Payments shown by the books to have been received by Adamson Brothers Company from Celanese Company of America as earnings of the partnership, amounting to \$9,500. are erroneously credited to the defendant Percy Adamson.

(d) Defendant Percy Adamson has failed to charge as an expense of the business of Adamson Brothers Company, and has erroneously charged to himself, payments amounting to \$1,216.27 shown by the books to have been made to Paul Kolisch for services rendered to the part-

nership in connection with Lastex patent and trade-mark and charged on the books to expenses of the business.

(e) The said contracts between Percy Adamson and United States Rubber Company, dated January 2, 1932, which are as- [29] sets of the partnership, are not included in the assets for which the defendant Percy Adamson is accountable.

(f) Defendant Percy Adamson has failed to charge himself and credit plaintiff with the \$100,000. note made by plaintiff James H. Adamson and Minnie C. Adamson, dated May 1, 1931, together with the collateral deposited with the American Seating Company therefor, which note and collateral were acquired by Thomas Adamson pursuant to the contract between Thomas Adamson and American Seating Company, dated March 4, 1935.

(g) Defendant Percy Adamson has failed to credit himself and to charge plaintiff James H. Adamson with one-half of the sums of \$2,000.00 and \$3,700.00, respectively, representing money shown by the books to have been paid by Adamson Brothers Company to Seth Adamson and charged on the books to the plaintiff James H. Adamson.

(h) Defendant Percy Adamson has failed to credit plaintiff James H. Adamson with advances shown by the books to have been made to Adamson Brothers Company through plaintiff's proprietary business Superior Seating Company, amounting to \$9,455.00.

(i) Defendant Percy Adamson has failed to charge himself with interest on the excess of

(1) amounts withdrawn from the partnership by the defendant after the defendant's wrongful appro-

priation of exclusive control of the firm's assets on or about November 1, 1931; over

(2) the amount of payments to plaintiff or for the plaintiff's account after November 1, 1931, plus defendant's salary at the rate of \$7,800.00 a year.

(j) Defendant Percy Adamson has failed to credit his account with \$37,675.00 to which the books show he was entitled as salary.

(k) Defendant Percy Adamson has erroneously charged [30] to himself \$1,603.83, which by agreement of the parties was charged to profit and loss as of December 31, 1926, and is so shown on the books.

(l) Defendant Percy Adamson has erroneously charged to the plaintiff \$955.00 of the amount on Schedule "8" of the account, said sum of \$955. being the amount of payments included in said schedule, which by agreement of the parties was charged to expenses and is so shown on the books.

(m) Defendant Percy Adamson has erroneously charged to the plaintiff James H. Adamson \$1,140.00, the amount shown on Schedule "10-B" of the account, which by agreement of the parties was charged to expenses and is so shown on the books.

(n) Defendant Percy Adamson has erroneously charged to the plaintiff James H. Adamson \$3,955.00, the amount shown on Schedule "9" of the account as payments to Harold C. Adamson, which by agreement of the parties was charged to expenses and is so shown on the books.

(o) Defendant Percy Adamson has erroneously charged to the plaintiff James H. Adamson \$950.00 of the amount shown on Schedule "6" of the account, said sum of

\$950.00 being the amount of payments included in said Schedule, which by agreement of the parties was charged to expenses and is so shown on the books. The items of said sum of \$950.00 are as follows:

June 20, 1927	Cash	C.D. 65	\$125.00
July 19, 1927	Cash Travelling Expenses	C.D. 67	135.00
Nov. 25, 1927	Check	C.D. 93	100.00
Dec. 13, 1927	Check	C.D. 95	90.00
Jan. 16, 1928	Check	C.D. 97	50.00
Feb. 10, 1928	Check	C.D. 99	150.00
June 4, 1928	Cash	C.D. 107	100.00
June 26, 1928	Cash	C.D. 107	100.00
July 14, 1928	Cash	C.D. 113	50.00
Oct. 27, 1928	Check	C.D. 119	50.00
[31]			

The net equity of both partners in the property and assets of the copartnership as shown by the balance sheet as of October 31, 1931, Exhibit "A" in the account filed by Percy Adamson herein, is \$56,373.55, which is the amount for which Percy Adamson would be chargeable without giving effect to the corrections hereinbefore in this finding set forth. In addition to the charges and credits hereinbefore in this finding set forth Percy Adamson is entitled to the credits of \$35,000. and \$15,000. shown in Schedule 10-A of the account herein, and also to a credit of one-half of the amount of salary at the rate of \$7,800. a year from November 1, 1931 to December 31, 1937, amounting to \$24,075.00, which amount should correspondingly be charged to James. Annexed hereto marked Exhibit "D" is a summary statement of the account submitted by the defendant Percy Adamson giving

effect to all of the foregoing matters. Said summary statement charges the defendant with royalties earned under the contract with the United States Rubber Company, Exhibit "A," throughout the period ending September 30, 1937, and with retainer payments at the rate of \$1,000. a month pursuant to the contract with the United States Rubber Company, Exhibit "B," for the entire calendar year 1937, but does not include any royalties earned pursuant to the said contract Exhibit "A" after September 30, 1937, nor any commission or bonus under said contract Exhibit "B" for any period after December 31, 1936, except monthly retainer payments aggregating \$12,000. for 1937.

CONCLUSIONS OF LAW

1. The partnership accounts for the period referred to in Exhibit "D" hereto annexed, should be settled and allowed as filed and adjusted by said Exhibit "D." [32]

2. Each of the objections of the plaintiff James H. Adamson to the account submitted by the defendant Percy Adamson, "1" to "15" inclusive, is sustained, except that objection "1" is sustained only to the extent indicated in Finding of Fact "19," and except that the interest chargeable to defendant Percy Adamson on the excess of

(1) amounts withdrawn from the partnership by the defendant after the defendant's wrongful appropriation of exclusive control of the firm's assets on or about November 1, 1931; over

(2) the amount of payments to plaintiff or for the plaintiff's account after November 1, 1931, plus defendant's salary at the rate of \$7,800.00 a year,

should be simple interest at the rate of 4% per annum.

3. Said copartnership was prior to the making of the aforesaid contracts with the United States Rubber Company the owner of United States Letters Patent No. 1,822,847, and the Lastex trade-mark and is now the owner of the contracts between Percy Adamson and the United States Rubber Company, Exhibits "A" and "B" dated January 2, 1932.

4. Judgment should be made herein awarding the title to the interest of the partnership in said contracts to the respective partners as follows: James H. Adamson and Percy Adamson are each entitled to an undivided one-half share as a tenant in common in the contract Exhibit "A" and to all payments due or to grow due under said contract covering the period subsequent to September 30, 1937, and to an undivided one-half share as a tenant in common in said contract Exhibit "B" and to all payments due or to grow due thereunder covering the period after December 31, 1936, excluding salary of \$12,000. a year paid to Percy Adamson for the calendar year 1937, which is embraced in the amount herein, and excepting that out of any payments made pursuant to said contract for any year after 1937 Percy Adamson shall [33] be entitled to the first \$7,800. paid in each year, and only the balance over that sum shall be divided between the parties.

5. In addition to said undivided interest in said contracts with the United States Rubber Company, Exhibits "A" and "B," in accordance with the provisions of Conclusion of Law No. "4" hereof, plaintiff James H. Adamson is entitled to judgment against the defendant Percy Adamson for the sum of Two Hundred Seventy-one Thousand Forty-four and 92/100 Dollars (\$271,044.92). In addition to any other remedy or remedies provided by law for the collection of said judgment, the amount thereof, or so much thereof as shall at any time remain unpaid, should be charged upon the share of Percy Adamson in the said contracts.

6. Thomas Adamson holds the said note of James H. Adamson and Minnie C. Adamson, together with the collateral therefor, including all of his right, title and interest in the said bank deposit of \$19,729.73, and in and to the said two judgments rendered in Supreme Court, Kings County in favor of Thomas Adamson against Minnie C. Adamson, as follows: On July 5, 1935, for \$105,727.05, and on May 20, 1937 for \$56.20, as trustee for James H. Adamson. Upon the transfer of such note and collateral to the plaintiff James H. Adamson, Percy Adamson will be entitled to a credit upon the judgment herein in the amount of \$25,000.

7. Plaintiff James H. Adamson is entitled to judgment providing that the defendant Percy Adamson be directed to execute and deliver to the plaintiff James H. Adamson within ten (10) days after the entry hereof, an

assignment of the undivided share in said contracts, Exhibits "A" and "B" in accordance with Conclusion of Law No. "4" hereof, such assignment to be by way of confirmation and further assur- [34] ance of the title to such undivided share to be awarded by the judgment herein; and that the plaintiff Thomas Adamson and the defendant Percy Adamson be directed within ten (10) days after the entry hereof to deliver to the plaintiff James H. Adamson the said note for \$100,000., and the collateral therefor, as set forth in Finding of Fact No. "13" hereof, together with an assignment in due form of all of the right, title and interest of said Thomas Adamson therein, and also of an assignment of two judgments rendered in Supreme Court, Kings County in favor of said Thomas Adamson and against said Minnie C. Adamson, as follows: on July 5, 1935 for \$105,727.05, and on May 20, 1937 for \$56.20, and that Thomas Adamson procure Robert P. Levis, his attorney to join with John H. Jackson, attorney for James H. Adamson in paying to James H. Adamson, or his attorneys, the sum of \$19,729.73 now on deposit in The National City Bank of New York, upon the plaintiff James H. Adamson executing and delivering to the attorney for Percy Adamson a written stipulation that Percy Adamson be credited with the sum of \$25,000., as a payment on account of the judgment.

8. Plaintiff James H. Adamson is entitled to his costs to be taxed.

9. Said judgment shall provide that any party may apply at the foot thereof for such relief as to the Court may seem just in order to provide for the enforcement thereof.

Let judgment be entered accordingly.

Dated: New York City, January 8th, 1938.

/s/ HAROLD S. MEDINA

Referee [35]

No. 8438

(Comparing Desk)

State of New York,)
County of New York,) ss.:

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, Do Hereby Certify, That I have compared the preceding with the original

Decision

filed in my office Jan'y. 11, 1938 and that the same is a correct transcript therefrom, and of the whole of such original.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, this 7 day of Oct. 1943.

/s/ ARCHIBALD R. WATSON

County Clerk and Clerk of the Supreme Court,
New York County [36]

[EXHIBIT "B"]

Certificate No. 5449 B

Fee \$4.50

Stub No. 10244

Cashier N

State of New York

County of New York—ss.

I, Archibald R. Watson, County Clerk and Clerk of the
Supreme Court, New York County,

Do Hereby Certify, that I have compared the within
photographic copy of a

JUDGMENT

entitled

JAMES H. ADAMSON,

vs.

PERCY ADAMSON, et ano

the original of which is filed in my office, under

Index Number 19023-1934

File Number

Date Filed July 8, 1938

and that such photographic copy is a correct transcript
thereof and of the whole of said original.

In Witness Whereof, I have hereunto set my hand and
affixed my official seal this 6th day of Oct., 1943.

(Seal) /s/ ARCHIBALD R. WATSON

County Clerk and Clerk of the Supreme Court,
New York County [37]

SUPREME COURT : NEW YORK COUNTY

X

James H. Adamson,
105 West 40th Street :
New York City,

Plaintiff,

– against – :

Percy Adamson,
1790 Broadway, :
New York City,

Defendant,

and :

Superior Seating Company, Inc.,
105 West 40th Street, :
New York City,

Defendant.

X JUDGMENT

Thomas Adamson, #19023/1934
2074 East 26th Street, :
Brooklyn, New York,

Plaintiff, :

– against –

Superior Seating Company, Inc., :
Lillian Mandel and Jacob Klausner, :
105 West 40th Street, :
New York City,

Defendants,

and :

James H. Adamson,
Defendant. :

X

The issues in the above entitled action with respect to which a new trial was ordered by an order of the Appellate Division, First Department, entered February 9, 1937, upon which judgment was entered in the Office of the Clerk of this Court on February 11, 1937, having been duly referred to Harold R. Medina, Esq., as Referee to hear and determine, by order made at Special Term, Part III of this Court, dated the 19th day of March 1937, upon the consent of all parties to the action; and the said order of the Appellate Division and the judgment entered thereon having [38] thereafter been resettled, and the issues with respect to which a new trial was ordered by said resettled order of the Appellate Division having thereafter been referred to said Harold R. Medina, Esq., as Referee to hear and determine, by order made at Special Term, Part III of this Court, dated the 4th day of March, 1937, likewise upon the consent of all the parties to the action; and the account of the defendant Percy Adamson having been filed with the Referee on or about the 15th day of April 1937; and objections of the Plaintiff James H. Adamson to said account having been filed with the Referee on or about the 26th day of April 1937; and the trial of said issues having duly taken place before the Referee, and he having duly made his report herein setting forth his Findings of Fact and Conclusions of Law, and directing judgment as hereinafter specified, and said report having been duly filed in the Office of the Clerk of the County of New York on January 11, 1938, and the costs and disbursements of plaintiff James H. Adamson having been duly adjusted,

It is now Ordered, Adjudged and Decreed:

1. That the partnership accounts for the period referred to in Exhibit "D" annexed to the decision herein, should be settled and allowed as filed and adjusted by said Exhibit "D."

2. That James H. Adamson and Percy Adamson are each hereby awarded an undivided one-half share as a tenant in common in the contract between Percy Adamson and the United States Rubber Company, dated January 2, 1932, a copy of which is annexed to the decision herein marked Exhibit "A," and to all payments due or to grow due under said contract, [39] covering the period subsequent to September 30, 1937, and to an undivided one-half share as a tenant in common in the contract between Percy Adamson and the United States Rubber Company, dated January 2, 1932, a copy of which is annexed to the decision herein marked Exhibit "B" and to all payments due or to grow due thereunder covering the period after December 31, 1936, including salary of \$12,000. a year paid to Percy Adamson for the calendar year 1937, which is embraced in the account herein, and excepting that out of any payments made pursuant to said contract for any year after 1937 Percy Adamson shall be entitled to the first \$7,800. paid in each year, and only the balance over that sum shall be divided between the parties.

3. That in addition to said undivided interest in said contracts the plaintiff James H. Adamson do recover of the defendant Percy Adamson the sum of Two Hundred Seventy-one Thousand Forty-four and 92/100 Dollars (\$271,044.92), together with interest on the sum awarded

by the report, to wit: \$271,044.92, from January 11, 1938, amounting to \$7679.61 and the costs and disbursements of the plaintiff James H. Adamson as taxed herein amounting to \$5689.60 making in the aggregate the sum of \$284,414.13 and have execution therefor. In addition to any other remedy or remedies provided by law for the collection of said judgment, the amount thereof, or so much thereof as shall at any time remain unpaid, is hereby charged upon the share of Percy Adamson in the said contracts.

4. That defendant Percy Adamson is hereby directed [40] to execute and deliver to the plaintiff James H. Adamson within ten (10) days after the entry hereof, an assignment of the undivided share in said contracts Exhibits "A" and "B" in accordance with paragraph "2" hereof, such assignment to be by way of confirmation and further assurance of the title to such undivided share.

5. That Thomas Adamson, plaintiff in the second above entitled action, and the defendant Percy Adamson are directed within ten (10) days after the entry hereof to deliver to the plaintiff James H. Adamson the note for \$100,000. made by plaintiff James H. Adamson and Minnie C. Adamson to the American Seating Company and the collateral therefor as set forth in Finding of Fact No. "13" of the decision herein, together with an assignment in due form of all of the right, title and interest of said Thomas Adamson therein, including an assignment of two judgments rendered in Supreme Court, Kings

County in favor of said Thomas Adamson and against said Minnie C. Adamson, as follows: on July 5, 1935 for \$105,727.05, and on May 20, 1937 for \$56.20, and that Thomas Adamson procure Robert P. Levis, his attorney, to join with John H. Jackson, attorney for James H. Adamson in paying to James H. Adamson, or his attorneys, the sum of \$19,729.73 now on deposit in The National City Bank of New York, upon condition that the plaintiff James H. Adamson simultaneously execute and deliver to the attorney for Percy Adamson a written stipulation that Percy Adamson be credited with the sum of \$25,000. as a payment on account of this judgment.

6. That any party may apply at the foot hereof for [41] such relief as to the Court may seem just in order to provide for the enforcement thereof.

Dated: July 8, 1938.

/s/ ARCHIBALD R. WATSON

Clerk.

The foregoing judgment approved as to form.

/s/ HAROLD S. MEDINA

Referee.

Certified Copy Issued—P

Fee Paid.....

Date 1e/SH

County Clerk, N. Y. Co.

By [42]

File No. 19023 Year 1934
Supreme Court : New York County

James H. Adamson,
 Plaintiff,

vs.

Percy Adamson,
 Defendant,
 and
Superior Seating Company, Inc.,
 Defendant.

Fee paid \$4.75
Stub No. 24968
July 8, 1938
County Clerk N.Y. Co.
By B. H.

Thomas Adamson,
 Plaintiff,

vs.

Superior Seating Company, Inc.
et al.,

Defendants,
and

James H. Adamson,
 Defendant.

Cashier

JUDGMENT

Filed and Docketed July 8, 1938—
1:05 P.M.

Recorded
Photostat Div.
Jul. 12, 1938

Hall, Cunningham, Jackson & Haywood
Attorneys for James H. Adamson
22 East 40th Street
Borough of Manhattan
City of New York [43]

EXHIBIT "C"

This Agreement, made in the City of New York, State of New York, on October 20th, 1939, by James H. Adamson, residing in Rye, New York, (hereinafter called the "First Party"), William Edwin Hall, Warren W. Cunningham, John H. Jackson, Alfred W. Haywood and Chester M. Patterson, partners engaged in the practice of law, at No. 22 East 40th Street, in the City and County of New York, under the firm name and style of Hall, Cunningham, Jackson & Haywood, Esqs., (hereinafter called the "Second Parties"), Percy Adamson, residing in Purchase, New York, (hereinafter called the "Third Party") and United States Rubber Company, a corporation duly organized, created and existing under and by virtue of the laws of the State of New Jersey, duly authorized to do business in the State of New York, with offices at No. 1790 Broadway, Manhattan Borough, New York City, (hereinafter called the "Fourth Party");

Witnesseth:

Whereas, on or about May 14, 1934, the First Party, as plaintiff, by the Second Parties, as his attorneys, commenced an action, bearing index number 19023/34, in the Supreme Court, New York County, against the Third Party, as defendant, wherein judgment was demanded for the dissolution of a partnership alleged to exist between the First and Third Parties, and for an accounting of the affairs and property thereof; and

Whereas, in the said action the First Party claimed, further, that the partnership was the sole owner of: (I) the certain trade mark "Lastex" and the registration thereof; (II) the certain invention for which applications were

filed in the United States Patent Office on July 30, [44] 1930 and June 11, 1931, respectively, and for which United States Letters Patent number 1,822,847 were issued under date of September 9, 1931, together with Letters Patent of Foreign Countries, issued thereon, and applications therefor; (III) the certain contract dated January 2, 1932, made by and between the Third and Fourth Parties, hereinafter called the "License Agreement," pursuant to which, among other things, the Third Party granted to the Fourth Party an exclusive license under United States Patent No. 1,822,847 and Canadian Patent No. 317,346, and under any corresponding patents, and applications for patents, granted by, or filed in, any Countries foreign to the United States and Canada, and the Fourth Party agreed to pay to the Third Party certain royalties, and the Third Party agreed, upon demand, to assign to the Fourth Party any and all of said patents and applications upon conditions stated in the said "License Agreement," which contract is hereby incorporated in and made part of this agreement by reference; and (IV) the certain contract dated January 2, 1932, made by and between the Third and Fourth Parties, hereinafter called the "Service Agreement," under which, among other things, the Third Party was engaged by the Fourth Party to sell, for the Fourth Party, and to promote the development and sale, by the Fourth Party, of certain elastic yarns and articles made thereof, and the Fourth Party agreed to pay to the Third Party certain compensation for such services, as therein provided, which contract is hereby incorporated in, and made part of this agreement by reference; and

Whereas, the issues in the said action ultimately were resolved in favor of the First Party and against the Third Party by Harold R. Medina, Esq., who, [45] theretofore, by order made and entered therein, had been duly appointed Referee to hear and determine, and who, on December 31, 1937, rendered his opinion in the case, and on January 8, 1938 made his report wherein he set forth his Findings of Fact and Conclusions of Law; and

Whereas, the said action thereafter was settled by the execution and exchange of certain writings, including: (I) a memorandum of agreement, dated February 23, 1938, made by and between the First and Third Parties, consented to by the Fourth Party; (II) a letter agreement, dated February 23, 1938, made by and between the First and Third Parties; and (III) a stipulation, dated February 23, 1938, made by and between the then respective Attorneys for the First and Third Parties, with the authorization and approval of the said First and Third Parties noted thereon, all of which are incorporated in and made part of this agreement by reference; and

Whereas, on or about July 8, 1938, judgment was entered in the said action, wherein and whereby, among other things, it was directed that the First Party recover of the Third Party the sum of \$271,044.92, with interest, amounting to \$7,679.61, and costs and disbursements taxed at \$5,689.60, making an aggregate of \$284,414.13, in all, and have execution therefor, which said judgment, thereafter, and by order made on or about August 11, 1938, was modified and amended so as to indicate at the foot thereof all of the certain terms and provisions of settlement contained in the said writings executed and exchanged, as aforesaid; and

Whereas, in consideration of legal services theretofore rendered by them in the certain action aforesaid, [46] the Second Parties, by the agreement of the First Party, were given a certain interest in and to the certain action, judgment, and settlement, aforesaid, in pursuance of which an assignment was executed in their favor by the said First Party, a copy of which is annexed hereto, marked "Exhibit A," and notice thereof given to the Third and Fourth Parties by writings dated January 30, 1939; and

Whereas, thereafter, because of differences regarding construction of said writings executed and exchanged, as aforesaid, as well as in certain other matters, the Third Party, as plaintiff, caused five separate actions to be instituted in the Supreme Court, Westchester County, four against the First Party, as defendant, and one against the Superior Seating Company, Inc., of No. 105 West 40th Street, Manhattan Borough, New York City, as defendant; and

Whereas, the five certain actions aforesaid thereafter were settled by agreement dated September 11, 1939, made by the First, Second and Third Parties hereto, together with the said Superior Seating Company, Inc., by the terms of which the Third Party undertook to pay to the First Party the sum of \$21,447.56, in installments as therein specified, a copy of which agreement is annexed hereto marked "Exhibit B"; and

Whereas, the parties hereto have agreed upon the bargain, sale, transfer and assignment by the First and Second Parties of their certain rights, hereinbefore mentioned, but only upon the terms and conditions hereinafter provided; and

Whereas, in consideration of the representations, undertakings, and actions of the First and Second Parties, herein stated, and in consideration of the execution, [47] and exchange by and between the Third and Fourth Parties, contemporaneously herewith, of a certain additional agreement, the Fourth Party has agreed to make the certain payments hereinafter provided;

Now, Therefore, in consideration alike of the foregoing, and of the following recitals, representations and warranties, and of the several and mutual covenants, promises and agreements herein contained, and of the sum of One (\$1.00) Dollar, lawful money of the United States, by each of the parties hereto to the other, and others, in hand paid, the receipt whereof is hereby severally acknowledged, confessed and admitted by each of them, the parties hereto do hereby severally covenant and agree as follows, each of the parties hereto agreeing for himself or itself and for no other parties hereto;

First: (A) That the First Party does hereby bargain, sell, assign, transfer and set over to the Third Party all of his right, title and interest in, to and under:

(I) The certain partnership which formerly existed between the said First and Third Parties under the firm name and style of Adamson Bros. Company, as well as the certain corporation, Adamson Bros. Company, Inc., organized under and by virtue of the laws of the state of New York, which later succeeded the said partnership, and the capital stock and obligations thereof, and in all the monies, trade marks, trade names, accounts due, or to become due, and in all other assets of any kind, nature and description whatsoever, which belonged, or belongs, to

the said Adamson Bros. Company and Adamson Bros. Company, Inc., or either of them, which said assets include, or may include, among other things, the following:

(a) the reversionary or other right in the certain trade mark "Lastex" and the registration thereof;

(b) the certain invention for which applications were filed in the United States Patent Office on or about July 24, 1930 and June 11, 1931, respectively, for which United States Letters Patent No. 1,822,847 were [48] issued under date of September 8, 1931, together with all Letters Patent of Foreign Countries, issued thereon, and all applications therefor, and any and all other inventions of the Third Party, whether patented or not and whether or not heretofore assigned to the Fourth Party;

(c) the two certain contracts, both dated January 2, 1932, made by and between the Third and Fourth Parties, hereinbefore described and referred to as the "License Agreement" and the "Service Agreement," respectively, as heretofore modified.

(II) the certain judgment which was duly entered, filed and docketed under number 19023/34 in the office of the Clerk of the County of New York, on or about July 8, 1938, in favor of the First Party, and against the Third Party, and all monies due, and to grow due, thereunder, and the whole, as well as each and every part, thereof.

(B) That the Second Parties, and each of them, do hereby join with the First Party in the foregoing and do hereby bargain, sell, assign, transfer and set over to the Third Party, any and all of their, and each of their, right, title, and interest, in, to, and under, the certain things hereinbefore more particularly described in paragraph "First, subdivision (A)" hereof; and the Second Parties, and each of them, further do hereby remise, release, and forever discharge, the First, Third and Fourth Parties, and each of them, of all, and from all, and all manner of, action and actions, cause, and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, or in equity, that against the said First, Third and Fourth Parties, or any of them, the said Second Parties, or any of them, ever had, now have, or hereafter can, shall, or may, have for, upon, or by reason of any matter, cause, or thing, whatsoever, from the beginning [49] of the world up to, and including, the day of the date of this agreement.

(C) That the First Party does hereby represent to, and covenant with, the Third and Fourth Parties, and each of them, that he has not heretofore bargained, sold, assigned, transferred, or set over, or attempted to bargain, sell, assign, transfer, or set over, his right, title and interest in, to, and under the certain things hereinbefore more particularly described in paragraph "First, subdivision (A)" hereof, or any part, or parts, thereof, to any person, firm, association, or corporation, and that he has not, in any way, mortgaged, or incumbered, or at-

tempted to mortgage, or incumber, the same, or any part, or parts, thereof, and that there are no liens on, or incumbrances, of any nature, kind, or description, whatsoever, upon, his said interests, or any part, or parts, thereof, attaching thereto since the First Party acquired ownership thereof, excepting certain assignments which

(initialed) JN jha dn February 23, 1938 and of he made in favor of the Second Parties, under date of /
latter agreement

January 30, 1939, a copy of which / is annexed hereto as "Exhibit A," which said assignment is to be paid off and satisfied simultaneously with, by, and upon, the execution of this agreement.

(D) That the Second Parties, and each of them, do hereby represent to, and covenant with, the Third and Fourth Parties, and each of them, that neither they, nor any of them, have heretofore bargained, sold, assigned, transferred, or set over, or attempted to bargain, sell, assign, transfer, or set over, their right, title, and interest, in, to, and under, the certain things hereinbefore more particularly described in paragraph "First, subdivision (A)" hereof, [50] or any part, or parts, thereof, to any person, firm, association, or corporation, and that neither they, nor any of them, have, in any way, mortgaged, or incumbered, or attempted to mortgage, or incumber the same, or any part, or parts, thereof, and, further, that there are no liens, or incumbrances, of any nature, kind, or description, whatsoever, upon their, or any of their, said interests, or any part, or parts, thereof, except the certain assignment which was made in their favor by the First Party under date of January 30

1939, a copy of which is annexed hereto as "Exhibit A," which said assignment is to be paid off and satisfied simultaneously with, by, and upon, the execution of this agreement.

(E) That the mutual obligations of the First, Second and Third Parties, provided in the certain agreement dated September 11, 1939, made by the said First, Second and Third Parties, together with the Superior Seating Company, Inc., which agreement is annexed hereto, marked "Exhibit B," are hereby expressly reserved, and excepted herefrom, and shall continue in full force and effect notwithstanding the execution of this agreement by the several parties hereto; and that, otherwise, the First Party does hereby remise, release and forever discharge the Second, Third and Fourth Parties, and each of them, of all, and from all, and all manner of, action, and actions, cause, and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, or in equity, that against the said Second, Third and Fourth Parties, or any of them, the said First Party ever had, now has, or hereafter [51] can, shall, or may, have for, upon, or by reason of any matter, cause, or thing, whatsoever, from the beginning of the world up to, and including, the day of the date of this agreement.

(F) That the Third Party covenants to assume, pay and satisfy, or cause to be paid and satisfied, all debts and other liabilities, of any kind, or nature, whatsoever, of the certain partnership which formerly existed between the First and Third Parties under the firm name and style of Adamson Bros. Company, as well as of the cer-

tain corporation Adamson Bros. Company, Inc., organized under, and by virtue of, the laws of the State of New York, which later succeeded the said partnership; and the Third Party further covenants to save and hold harmless the First Party against any and all liability and/or claims and/or damages that the First Party may sustain, become liable, or answerable, for, or shall pay, upon or in consequence of, such debts, or other liabilities, (initialed) JN JHA DN as well as any claim of any nature by the said partnership or corporation

against the First Party.

(G) That simultaneously with the execution of this agreement, the First Party shall make, execute, and deliver to the Third Party, a satisfaction of the whole, and each and every part, of the certain judgment which was duly entered, filed, and docketed under numer 19023/34, in the office of the Clerk of the County of New York, on or about July 8, 1938, in favor of the First Party and against the Third Party, which satisfaction shall be in form suitable and proper for filing.

(H) That the First Party and the Third Party hereby mutually rescind and terminate all of said agreements made on or about February 23, 1938, including a memorandum of agreement dated said date and an agreement in the form of a letter dated said date addressed by the Third Party to the [52] First Party and accepted by the First Party; and the Second Parties hereby release and relinquish to the Third Party any and all right, title and interest which they, or any of them, have, or may have, in or to any of said agreements or in or to any payments or benefits thereunder;

(I) That the First Party and the Second Parties hereby acknowledge and warrant to and agree with the Fourth Party that neither they nor any assignee or assignees of theirs, or any other person or concern claiming through them, nor any of them, has any reversionary or other interest in said United States Patent No. 1,822,847 or any corresponding foreign patent or in any other patent or property right or rights acquired by the Fourth Party from or through the Third Party or in said trade mark "Lastex" or said registration thereof.

(J) That the First and Second Parties, and each of them, do hereby further covenant that they, and each of them will, at any time, or times, at the reasonable request of the Third and Fourth Parties, or either of them, make, execute, and deliver, every such further instrument, or conveyance, for the better, or more effectually, vesting and confirming of all of the rights, titles, interests, properties, claims and demands hereby bargained, sold, assigned, transferred, and set over, to the Third Party, or so intended to be, as by the said Third and Fourth Parties, or either of them, or either of their respective counsel, shall be advised or requested.

Second: That in consideration of the foregoing, the Fourth Party shall pay:

(A) to the Second Parties, the sum of \$110,000.00, without interest, as follows: [53]

\$60,000.00, simultaneously with the execution of this agreement, the receipt whereof is hereby acknowledged, confessed and admitted; \$50,000.00 on January 2, 1940.

(B) to the First Party, the sum of \$215,000.00, without interest, as follows:

\$5,000.00 simultaneously with the execution of this agreement, the receipt whereof is hereby acknowledged, confessed and admitted;

\$210,000.00 in equal installments of \$2,500.00 each, the first installment on December 1, 1939, and thereafter on the 1st day of each second month until the full sum of \$210,000.00 shall have been paid.

However, the First Party shall have the right to require of the Fourth Party, and the Fourth Party shall thereupon pay to the First Party, in each instance upon thirty days' notice in writing to such effect, payments of monies on account, only, however, as to each payment, to the extent, and at and between the times hereinafter indicated, which shall, when paid, reduce the principal indebtedness aforesaid, but shall not affect the continuity of the installment payments of \$2,500.00 each aforesaid, as follows:

During the years 1940 and 1941, an amount, or amounts, of monies, the total of which shall not exceed \$20,00.00 for the entire said period;

During the years 1942 and 1943, an amount, or amounts, of monies, the total of which shall not exceed \$20,000.00 for the entire said period;

During the years 1944 and 1945, an amount, or amounts, of monies, the total of which shall not exceed \$20,000.00 for the entire said period.

Third: That this agreement shall bind and inure to the benefit of the several parties hereto, and each [54] of their respective personal representatives, successors and assigns.

Fourth: That this agreement may be executed in any number of counterparts, and all of such counterparts shall constitute but one and the same agreement.

In Witness Whereof, the parties hereto have caused this agreement to be duly executed on the day and year first above written.

S/ James H. Adamson (L.S.)

HALL, CUNNINGHAM, JACKSON &
HAYWOOD, ESQS.

S/ William E. Hall

S/ Warren W. Cunningham

S/ John H. Jackson

S/ Chester M. Patterson

S/ Alfred W. Haywood

S/ Percy A. Adamson (L.S.)

In the Presence of:

S/ Maxwell Dopin

as to

James H. Adamson

John H. Jackson

Percy Adamson

(Signatures not entirely legible.)

UNITED STATES RUBBER
COMPANY

By Edward J. Coughlin

Vice President

Attest:

S/ Sue (?) Buckman

Secretary

State of New York)
 : SS
County of New York)

On the 20th day of October, 1939, before me came Edward J. Coughlin, to me known, who, being by me duly sworn, did depose and say that he resides in New York, New York; that he is the Vice-President of the United States Rubber Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; that he signed his name thereto by like order.

Notary Public, Kings County
Kings Co. Clerk's No. 6, Register's No. 104

Certificates filed in
New York Co. Clerk's No. 16, Register's No. 0111

Anna Iwanowins, Notary Public
Commission Expires March 30, 1940 [55]

Exhibit "A"

Agreement made this 30 day of January 1939, by and between William E. Hall, Warren W. Cunningham, John H. Jackson, Alfred W. Haywood and Chester M. Patterson, copartners doing business under the firm name and style of Hall, Cunningham, Jackson & Haywood (hereinafter referred to as "Hall," and James H. Adamson (hereinafter referred to as "Adamson").

Whereas under date of February 23rd, 1938, the parties hereto entered into a letter agreement covering the

settlement of the claim of Hall against Adamson for services rendered in connection with the litigation between James H. Adamson and his brother, Percy Adamson, under which agreement Adamson gave to Hall four promissory notes, the amounts and maturity dates of which are as follows:

Note payable August 15th, 1938, in the sum of \$12,500.

Note payable February 15th, 1939, in the sum of \$15,000.

Note payable February 15th, 1940, in the sum of \$20,000.

Note payable February 15th, 1941, in the sum of \$15,000.

Whereas Adamson has, since the date of the said agreement of February 23rd, 1938, made payments on account of the first note due August 15th, 1938, in the aggregate amount of \$2,000, leaving an unpaid balance thereon of \$10,500;

Whereas in addition to the foregoing, Adamson is indebted to Hall for disbursements paid and incurred, in the sum of \$7,000, and for additional professional services rendered to the date of this agreement in the sum of \$5000; and

Whereas it is desired by the parties hereto to provide by this agreement a mutually satisfactory and exclusive method for the payment of all of the said obligations,

Now Therefore, in consideration of the mutual promises herein contained, and of other good and valuable [56] consideration by each of the parties hereto to the other

in hand paid, receipt whereof is hereby acknowledged, the parties hereto have agreed and they do hereby agree as follows:

First: The obligations above mentioned, due to Hall, are divided into the following categories by which they shall be dealt with and known throughout the remainder of this agreement;

(a) The amount of \$15,000, represented by the note payable February 15th, 1939, and any amounts remaining unpaid thereof from time to time, shall be known as "Category one."

(b) The amount of \$20,000, represented by the note payable February 15th, 1940, and any amounts remaining unpaid thereof from time to time, shall be known as "Category two."

(c) The amount of \$15,000, represented by the note payable February 15th, 1941, and any amounts remaining unpaid thereof from time to time, shall be known as "Category three."

(d) All other amounts, including the amount unpaid of \$10,500 on the note due August 15th, 1938, the \$7000 disbursements, and the \$5000 additional fee, a total of \$22,500, shall be included in a single category known as "Category four."

Second: Adamson hereby assigns to Hall, in trust nevertheless, to be applied by the said Hall, as Trustee, pursuant to the directions contained hereinafter in this agreement, all of Adamson's right to receive royalties and commissions from the United States Rubber Company, pursuant to the agreement between Adamson and Percy Adamson, approved by the United States Rubber Com-

pany, dated February 23rd, 1938, and all of Adamson's right to receive payments of royalties, commissions and principal from Percy Adamson, pursuant to his agreement with Percy Adamson, embodied in a letter from [57] Percy Adamson to Adamson, dated February 23rd, 1938.

Third: The royalties and commissions above mentioned are payable quarterly, and are expected to be received by Hall, as Trustee, quarterly on or about the first days of February, May, August and November in each year.

Out of each quarterly payment of royalties and commissions received by Hall, as Trustee, pursuant to this agreement, during the year 1939, he shall first pay
(not?)

promptly to Adamson one-half thereof, but nor more than the sum of \$3000; except that if for any quarter the one-half of the said royalties and commissions paid to Adamson shall be less than \$3,000, the deficiency shall be made up out of any amount by which one-half of the royalties and commissions for any subsequent quarter shall exceed \$3000. Such payments to Adamson shall be known throughout the remainder of this agreement as "Adamson's quarterly share." Any payments received by Hall during the year 1939, in excess of "Adamson's quarterly share," shall be paid by Hall, as Trustee, to himself individually, and shall be applied in reduction of the amount then due in "Category one." Upon payment of "Category One" in full, any further payments received by Hall, as Trustee, in 1939, shall be applied to making up any amount by which "Adamson's quarterly share" paid in 1939 shall have fallen short of \$12,000.

In the event that such payments received by Hall, as Trustee, during the year 1939, shall exceed a sum

sufficient to pay Adamson \$12,000 during that year, and to pay in its entirety "Category one," that is to say, a total sum of \$27,000, then any excess thereover shall be paid by Hall, as Trustee, one-third to Adamson, and two-thirds to himself in- [58] dividually, and shall be applied against the amounts remaining unpaid in "Category four."

In the event that at the end of the year 1939, Hall, as Trustee, shall not have received sufficient moneys to pay himself individually the full amount of "Category one," then any amount remaining unpaid in that category shall be added to and become a part of "Category two," for the purposes of the remaining provisions of this agreement.

Fourth: Out of each quarterly payment of royalties and commissions received by Hall, as Trustee, pursuant to this agreement, during the year 1940, he shall first pay promptly "Adamson's quarterly share," as defined in article Third hereof. Any payment received by Hall during the year 1940, in excess of "Adamson's quarterly share" shall be paid by Hall, as Trustee, to himself individually and shall be applied in reduction of the amount then due in "Category two." Upon payment of "Category two" in full, any further payments received by Hall, as Trustee, in 1940, shall be applied to making up any amount by which "Adamson's quarterly share" paid in 1939 and 1940 shall have fallen short of \$12,000. a year.

In the event that such payments received by Hall, as Trustee, during the year 1940 shall exceed a sum sufficient to pay Adamson \$12,000 during that year, and in addition to pay any deficiency in "Adamson's quarterly share" for 1939, and to pay in its entirety "Category two,"

then any excess shall be paid by Hall, as Trustee, one-third to Adamson, and two-thirds to himself individually, and shall be applied against the amounts remaining unpaid in "Category four." [59]

In the event that at the end of the year 1940 Hall, as Trustee, shall not have received sufficient moneys to pay himself the full amount of "Category two," then any amount remaining unpaid in that Category shall be added to and become a part of "Category three," for the purposes of the remaining provisions of this agreement.

Fifth: Out of each quarterly payment of royalties and commissions received by Hall, as Trustee, pursuant to this agreement, during the year 1941, he shall first pay promptly "Adamson's quarterly share." Any payment received by Hall during the year 1941, in excess of "Adamson's quarterly share" shall be paid by Hall, as Trustee, to himself individually and shall be applied in reduction of the amount then due in "Category three."

In the event that such sums received by Hall, as Trustee, during the year 1941 shall exceed a sum sufficient to pay Adamson \$12,000 in that year, and in addition to pay any deficiency in "Adamson's quarterly share" for 1939 and 1940, and to pay in its entirety "Category three," then any excess shall be paid by Hall, as Trustee, one-third to Adamson and two-thirds to himself individually and shall be applied against the amounts remaining unpaid in "Category four."

In the event that at the end of the year 1941, Hall, as Trustee, shall not have received sufficient moneys to pay himself individually the full amount of "Category three," then any amounts remaining unpaid in that Category

shall form a new Category to be known as "Category five."

Sixth: Out of each quarterly payment of royalties and commissions received by Hall, as Trustee, pursuant to this [60] agreement, during the year 1942 or later years, he shall first pay promptly to Adamson "Adamson's quarterly share." Any such payment received by Hall quarterly, in excess of "Adamson's quarterly share" during the year 1942, shall be paid by Hall, as Trustee, to himself individually, and shall be applied in reduction of any amount then remaining unpaid in "Category five."

In the event that the sums received by Hall, as Trustee, in any quarter during the year 1942, or in any year thereafter, shall exceed a sum sufficient to pay "Adamson's quarterly share," and to pay any remaining balance in "Category five," then any excess thereover shall be paid by Hall, as Trustee, one-third to Adamson and two-thirds to himself individually, and shall be applied in reduction of any amount then remaining unpaid in "Category four."

Seventh: At such time as Hall, as Trustee, shall have received, and shall have paid to himself individually, a sum sufficient to pay all of the amounts due in all of the above mentioned categories, this assignment and agreement shall terminate, and Hall, as Trustee, shall thereupon re-assign to Adamson all of the royalties and commissions and payments herein assigned, and shall pay over to Adamson any sums received by Hall in excess of the total amount due in all categories hereunder. It is agreed that Hall is to receive under this agreement only the total amounts included in the four Categories specified in Paragraph "First" of this agreement, with-

out any additional amounts as interest, commissions, Trustee's fees or otherwise.

Eighth: Whereas this agreement is intended to vest in Hall, as Trustee, all right of Adamson to any payments due [61] from Percy Adamson as principal payments under the settlement agreement between Adamson and Percy Adamson, dated February 23rd, 1938, as well as payments of royalties and commissions to be made by said Percy Adamson, any of such principal payments, when received by Hall, as Trustee, shall be paid one-third to Adamson, and two-thirds to himself individually, and shall be applied against obligations due in "Category four" above mentioned. Adamson shall retain sole control and discretion with respect to such principal payments due from Percy Adamson, and shall have the absolute right to enter into any arrangements with Percy Adamson, which he may desire, in reduction or in settlement thereof (but no reduction of Percy Adamson's liability below \$18,000. shall be made) and Hall, as Trustee, hereby agrees to follow all of the directions of Adamson with respect to such principal payments, and to execute any and all documents, consents and releases in connection therewith, which may be requested by Adamson from time to time; the only right of Hall, as Trustee, with respect to the said principal payments as against said Adamson being to receive the amount of any such payments which shall be made by Percy Adamson, and to dispose of same, as Trustee, as hereinbefore provided.

Ninth: This agreement and trust assignment supercedes in its entirety the said settlement agreement made between Hall and Adamson on February 23rd, 1938, except that the assignment by Adamson to Hall of an interest in future royalties and commissions made in that

agreement, and particularly referred to in the letter of Hall and Adamson to the City Bank Farmers Trust Company, dated February 23rd, 1938, shall continue in full force and effect. Hall agrees to [62] deliver up to Adamson for cancellation, immediately upon the execution of this agreement all of the four promissory notes herienabove described.

It is understood that Adamson is under no personal liability to Hall to make the payments hereinbefore referred to and that Hall will look solely to the assigned royalties, commissions and payments for the satisfaction of said obligations.

In Witness Whereof, the parties have hereunto set their hands and seals the day and year first above written.

HALL, CUNNINGHAM, JACKSON & HAYWOOD

By JOHN H. JACKSON (L.S.)

JAMES H. ADAMSON (L.S.)

James H. Adamson [63]

This Agreement, made in the City of New York, State of New York, on September 11, 1939, between Percy Adamson, residing in Purchase, New York (hereinafter called the "First Party"), James H. Adamson, residing in Rye, New York (hereinafter called the "Second Party"), Hall, Cunningham, Jackson & Hayward, of New York City (hereinafter called the "Third Parties") and Superior Seating Company, Inc., a corporation, duly organized, created and existing under and by virtue of the laws of the State of New York, with principal office at No. 105 West 40th Street, Manhattan Borough, New York City, (hereinafter called the "Fourth Party");

Witnesseth:

Whereas, on or about May 14, 1934, the Second Party, as plaintiff, by the Third Parties acting as his Attorney, commenced an action, bearing index number 19023/34, in the Supreme Court, New York County, against the First Party, as defendant, wherein judgment was demanded for a partnership accounting, which action ultimately was determined in favor of the Second Party and against the First Party, by Harold R. Medina, Esq., who theretofore, by order duly made and entered in the said action, had been duly appointed Referee to hear and determine, and who, on December 31, 1937, rendered his opinion in the case, and, on January 8, 1938, made his report, wherein he set forth his Findings of Fact and Conclusions of Law; and

Whereas, the said action thereafter was settled by the execution of three separate writings, as follows: A memorandum of agreement, dated February 23, 1938, [64] made by and between the First and Second Parties; a letter agreement, dated February 23, 1938, made by and between the First and Second Parties, and a stipulation, dated February 25, 1938, made by and between the then respective Attorneys for the said First and Second Parties, with the authorization and approval of the said First and Second Parties noted thereon, all of which are incorporated in and made part of this agreement by reference; and

Whereas, the Third Parties, by virtue of their position as such Attorneys for the Second Party and the services theretofore rendered by them for and on account of the Second Party, by agreement made by and between the said Second and Third Parties, was given an interest in

the said action and in the said settlement, by reason of which the said Third Parties are made a party to this agreement; and

Whereas, on or about January 28, 1938, the First Party, at the request of the Second and Fourth Parties, loaned to the Fourth Party the sum of \$5,000.00; and

Whereas, prior to the consummation of the certain settlement aforesaid, and on or before January 31, 1938, in proceedings bearing index number 60809, brought under Section 74 of the Bankruptcy Act by the Second Party in the United States District Court, for the Southern District of New York, the Second Party prepared for each of eighteen of his creditors, a series of five promissory notes, each series aggregating the total claim allowed therein for each of his said creditors, all of the said notes dated January 31, 1938 and made payable, without interest, at the National City Bank of New York, 42nd Street Branch, New York City, on [65] February 15, 1938, May 15, 1938, August 15, 1938, November 15, 1938 and February 15, 1939, respectively, and all of which aggregating \$51,685.11, subsequent to their execution by the Second Party and prior to the delivery thereof to each of the respective payees, were endorsed by the First Party, and

Whereas, the Second Party thereafter defaulted in making payment of certain of the said promissory notes, with the result that the First Party was required to make, and actually made, payments against the said several series of promissory notes, maturing on the dates and aggregating the sums, respectively, as follows: May 15, 1938—\$9,444.65; August 15, 1938—\$8,092.02; November 15, 1938—\$8,475.29; February 15, 1939—\$7,540.48, making a grand total of \$33,552.44 in all; and

Whereas, the First Party, as plaintiff, caused four separate actions to be instituted against the Second Party, as defendant, in the Supreme Court, Westchester County, wherein he demanded judgments, among other things, for the certain respective aggregate sums aforesaid, theretofore paid by him against the said certain promissory notes, which had matured on the respective dates aforesaid, and, further, caused an action to be instituted in the Supreme Court, Westchester County, in his behalf, as plaintiff, against the Fourth Party, as defendant, wherein he demanded judgment for the sum of \$5,000.00, theretofore loaned by him to the Fourth Party, and

Whereas, under the terms of the settlement made by and between the First and Second Parties, under date of February 23, 1938, embodied in the form of three separate [66] writings, hereinbefore described, the First Party undertook, among other things, to pay to the Second Party the sum of \$75,000.00, in five annual installments of \$15,000.00 each, commencing February 15, 1939, against which the said First Party, on or before April 22, 1938, paid to the Second Party amounts totalling \$20,000.00; and

Whereas, in the four certain actions instituted in the Supreme Court, Westchester County, by the First Party, as plaintiff, against the Second Party, as defendant, hereinbefore referred to, the Second Party interposed defenses and counterclaims, based upon an independent, collateral, oral agreement, alleged to have been made by and between the parties prior to, and at the time of, the execution of the three certain writings aforesaid, whereunder, among other things, he included the following claims: (1) That the First Party should pay \$30,000.00 towards the fees of the Third Party for legal services rendered

by the Third Party for, and on the account of, the Second Party; (II) that, notwithstanding the five annual installment payments of \$15,000.00 each, to be made by the First Party to the Second Party, to commence February 15, 1939, provided in the said written agreements dated February 23, 1938, the First Party, on or before August 15, 1938, should pay to the Second Party the said sum of \$75,000.00, in full; and (III) that should the First Party default in either of the foregoing undertakings then he, rather than the Second Party, should pay the certain promissory notes made by the Second Party and endorsed by the First Party, under the circumstances hereinbefore described, and thereby become entitled to receive [67] credit, to the extent thereof, by allocation against the remaining installment payments; and

Whereas, in the action instituted in the Supreme Court, Westchester County, by the First Party, as plaintiff, against the Fourth Party, as defendant, the Fourth Party interposed a defense based upon an independent collateral oral agreement, alleged to have been made by and between the parties prior to, or at the time of, the execution of the three certain writings aforesaid, whereunder it claimed that the First Party had released the Fourth Party from the debt alleged in the complaint; and

Whereas, the parties have agreed to settle all of the said five actions and to determine their differences and the issues and controversies indicated in the pleadings, affidavits and other papers in all of the said five actions;

Now, Therefore, in consideration alike of the foregoing, and of the following recitals, representations and warranties, and of the several and mutual covenants,

promises and agreements herein contained, and of the sum of One (\$1.00) Dollar, lawful money of the United States, by each of the parties to the other, and others, in hand paid, the receipt whereof is hereby severally acknowledged, confessed and admitted by each of them, the parties hereto do hereby covenant and agree, as follows:

First: (a) That the Second, Third and Fourth Parties, jointly and severally, do hereby remise, release and forever discharge the First Party of all, and from all, and all manner of, causes, claims and demands, whatsoever, [68] as against the First Party which they, or any of them, ever had, now have, or which they, or any of them, can, shall, or may, have for, upon, or by reason of an independent, collateral, oral agreement, alleged to have been made, by and between the parties hereto, prior to, and at the time of the execution of the three certain writings aforesaid and, among other things, particularly including the claims made thereunder, as follows: (I) That the First Party should pay \$30,000.00 towards the fees of the Third Party for the legal services rendered by the Third Party for, and on the account of, the Second Party; (II) that notwithstanding the five annual installment payments of \$15,000.00 each, to be made by the First Party to the Second Party, commencing February 15, 1939, provided in the written agreements dated February 23, 1938, the First Party, on or before August 15, 1938, should pay to the Second Party the said sum of \$75,000.00 in full; and (III) that should the First Party default in either of the foregoing undertakings, then he, rather than the Second Party, should pay the certain promissory notes made by the Second Party, and endorsed by the First Party, under the circumstances hereinbefore described, and thereby become entitled to

receive credit, to the extent thereof, by allocation against the remaining installment payments; and, pursuant to the foregoing, the Second and Fourth Parties, jointly and severally, do hereby specifically forever relinquish and release all manner of debts, causes, claims and demands, whatsoever, alleged in the answers, affidavits and all other papers, by way of defense, counterclaim, or otherwise, interposed in behalf of the defendants in the four certain actions instituted in the Supreme Court Westchester County, by the [69] First Party, as plaintiff, against the Fourth Party, as defendant.

Second: (a) That the Second Party does hereby covenant and agree to keep and to hold the First Part harmless of, and from, and against any and all, liability and to keep the said First Party indemnified against any and all actions, proceedings, costs, expenses, damages, claims and demands, whatsoever, which the First Party may sustain, or become liable for, by reason of his endorsements upon the said certain promissory notes, except to the extent of the payments, aggregating the sum of \$33,552.44 heretofore made by the First Party on account of and against the said certain promissory notes, said sum of \$33,552.44 being hereby expressly excluded herefrom.

(b) That in the event that the First Party hereafter shall be required, by judgment in a contested action, after notice to the Second Party, to make any payment, or payments, on account of, or against, the said certain promissory notes, then, and in such event, the said First Party, at his sole option, shall have the right to elect either to institute an action, or actions, and to recover a judgment, or judgments, therefor, as against the Second

Party, and to have any and all remedies thereon provided in law, or to apply such payment, or payments, and to take credit therefor against the installment payments which the First Party shall make to the Second Party, as hereinafter provided.

Third: That in additional consideration of this agreement, and of other consideration here declared to be mutual, valuable and sufficient, the First Party does hereby remise, release, and forever discharge the Fourth [70] Party of, and from, the certain debts, cause, claim and demand for the sum of \$5,000.00, loaned by the First Party to the Fourth Party, on or about January 28, 1938, and the First Party does hereby relinquish, renounce and forever withdraw the summons and complaint and any and all other papers, including the said debt, cause, claim and demand, therein alleged, in the certain action instituted in the Supreme Court, Westchester County, by the First Party, as plaintiff, against the Fourth Party, as defendant.

Fourth: (a) That the First Party having heretofore made payments to the Second Party under the certain written agreements, dated February 23, 1938, of sums totalling \$20,000.00 and having made certain payments against the certain promissory notes, made by the Second Party and endorsed by the First Party totalling the sum of \$33,552.44, making a grand total of \$53,552.44 in all, it is hereby agreed that the said grand total shall be applied in reduction of the sum of \$75,000.00, required by the terms of the said certain written agreements, dated February 23, 1938, to be paid by the First Party to the Second Party in five annual installments of \$15,000.00 each, to commence February 15, 1939, thus leaving a

balance due thereunder as of the date hereof amounting to the sum of \$21,447.56, and that, notwithstanding the provisions of the said certain written agreements, dated February 23, 1938, the said balance of \$21,447.56 shall be paid by the First Party to the Second Party, without interest, as follows:

On July	10, 1940	\$1,875.00	
“ October	10, 1940	1,875.00	
“ January	10, 1941	1,875.00	
“ April	10, 1941	1,875.00	
“ July	10, 1941	1,875.00	[71]
On October	10, 1941	\$1,875.00	
“ January	10, 1942	1,875.00	
“ April	10, 1942	1,875.00	
“ July	10, 1942	1,875.00	
“ October	10, 1942	1,875.00	
“ January	10, 1943	1,875.00	
“ April	10, 1943	822.56	

(b) That except as hereinabove modified, all of the terms, provisions and conditions contained and set forth in the memorandum agreement, dated February 23, 1938, made by and between the First and Second Parties, the letter agreement, dated February 23, 1938, made by and between the First and Second Parties, and the stipulation, dated February 23, 1938, made by and between the then respective Attorneys for the First and Second Parties, with the authorization and approval of the said First and Second Parties noted thereon, shall continue to remain in full force and effect.

Fifth: That, simultaneously with the execution of this agreement, the First and Second Parties shall execute, or shall procure their respective Attorneys to execute, and

exchange formal stipulations discontinuing, without costs, the four separate actions instituted in the Supreme Court, Westchester County, by the First Party, as plaintiff, against the Second Party, as defendant, and the action instituted in the Supreme Court, Westchester County, by the First Party, as plaintiff, against the Fourth Party, as defendant, and withdrawing and discontinuing all motions heretofore served, or made, in any of the said actions, and which presently are pending.

Sixth: That this agreement shall bind and inure to the benefit of the several parties hereto and each [72] of their respective personal representatives, successors and assigns.

Seventh: That this agreement may be executed in any number of counterparts, and all of such counterparts shall constitute but one and the same agreement.

In Witness Whereof, this agreement has been duly executed on the day and year first above written.

PERCY ADAMSON (L.S.)
JAMES H. ADAMSON (L.S.)
HALL, CUNNINGHAM, JACKSON &
HAYWOOD (L.S.)
SUPERIOR SEATING COMPANY, INC.
L.S.

By JAMES H. ADAMSON Pres.

No. 4649-BH. James H. Adamson et al. vs. U. S. A. Plfs. Exhibit No. 1. Filed 1-8-1946. Edmund L. Smith, Clerk, by John A. Childress, Deputy Clerk.

[Endorsed]: Filed Jan. 8, 1946. [73]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT

The above entitled matter came duly and regularly on to be heard before the undersigned, Leon R. Yankwich, one of the Judges of the above entitled court, at Los Angeles, California, on January 8, 1946, Zagon, Aaron and Sandler and Nathan Schwartz by Ray Sandler, appearing as attorneys for the plaintiffs, and Charles H. Carr, United States Attorney, E. H. Mitchell and George M. Bryant, Assistant U. S. Attorney, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, by George M. Bryant, appearing as attorneys for the defendant, the matter having been tried, and a Stipulation of Facts and oral evidence having been received, and argument of counsel having been heard, and the court being now fully advised in the premises, now makes herewith its Findings of Fact, Conclusions of Law, and Order for Judgment, to wit: [74]

FINDINGS OF FACT

I.

This action is brought to recover the sum of \$2,577.52, together with interest as prescribed by law, upon the theory that certain individual incomes taxes were erroneously and illegally assessed against and collected from the plaintiffs under the Internal Revenue laws of the United States.

II.

The plaintiffs herein at all times mentioned in the complaint were and still are husband and wife residing at

Laguna Beach in Orange County, State of California, within the Central Division, Southern District of the above entitled Court.

III.

That on or about March 14, 1941, the plaintiffs filed with the Collector of Internal Revenue for the Third District of New York their joint federal income tax return for the calendar year 1940; that said return was prepared upon a calendar year basis and showed a total gross income of \$42,525; that deductions were claimed against said income in the sum of \$21,569.55; that the tax indicated to be due thereon was shown to be \$2,489.15; that therewith plaintiffs paid to the Collector the sum of \$621.29 as the first installment of said joint income taxes; that on or about March 10, 1943, and subsequent to a disallowance of plaintiffs' claim for refund described hereinafter plaintiffs paid to the Collector of Internal Revenue for the Sixth Collection District of California upon said taxes the sum of \$1,000, and to the same Collector on or about April 8, 1943, plaintiffs paid as a final payment upon said taxes the sum of \$867.86, together with interest in the amount of \$168.11, and \$1 for release of a lien filed by the Collector of Internal Revenue for the Sixth Collection District of California against the property of the plaintiffs; and that the [75] total amount paid by plaintiffs by reason of their individual income and defense tax for the year 1940, including interest and lien charges, was the sum of \$2,658.26.

IV.

Plaintiffs claim that the correct amount of the tax due and owing from them was the sum of \$80.74. The

United States determined that the amount of tax due is \$2,589.15. The difference between the computations of the plaintiffs and the computations of the Government result from the inclusion in said return of the sum of \$32,500 received by the plaintiffs from one Percy Adamson, the brother of James H. Adamson, one of the plaintiffs in this case under an agreement dated October 20, 1939.

V.

That on or about June 13, 1941, the plaintiffs filed with the Collector of Internal Revenue for the Third District of New York claim for refund which was numbered 2,639,120 in the amount of \$540.55; that on October 5, 1943, the Commissioner of Internal Revenue rejected said claim for refund; that on or about December 27, 1943, plaintiffs filed a claim for refund in the sum of \$2,408.41, which was numbered 2,849,066 which claim was filed with the Collector of Internal Revenue for the Sixth Collection District of California; that on July 26, 1945, the Commissioner of Internal Revenue rejected this claim for refund; and that on August 2, 1945, this action was filed.

VI.

The grounds stated in the claim for refund filed June 13, 1941, are as follows:

Original income tax return was filed showing net income of \$20,955.45. Due to error, profit on sale of patent was included as income from royalties instead of a long term gain. If [76] correctly reported the total tax to be paid would amount to \$80.74 as per amended return filed. Since the sum of \$621.29

has been paid for the first quarterly payment on the amount erroneously reported, there has been an overpayment of \$540.55.

VII.

The grounds stated in the claim for refund filed December 27, 1943, are as follows:

Taxpayers filed a joint return for 1940 and erroneously reported a long term gain on the sale of capital assets as income from royalties. James Adamson sold to his brother all of his right, title and interest in and to a certain partnership between them, together with his interest in certain inventions and trade mark. The sale was made on or about October 20, 1939. The aforesaid partnership was entered into in November, 1925. The assets sold were held for more than two years before sale. The amount reported in 1940 as income from royalties was in fact long term gain on the sale of capital assets and only 50% thereof should have been taken into account.

This claim was prepared by Forest W. Monroe & Associates from information furnished by the Taxpayers.

VIII.

That on or about the first day of November, 1925, James H. Adamson and Percy Adamson entered into an agreement to become partners at will under the firm name and style of Adamson Bros. [77] Company, for the purpose of engaging in the business of developing and dealing in yarns and textiles, including the development of ideas in the field of special yarns, pursuant to an oral

understanding that James H. Adamson would furnish sufficient capital to get started, and that both James H. Adamson and Percy Adamson would cooperate in the management of the business, with James H. Adamson exercising a general supervision and control of the business, and Percy Adamson devoting all of his time and attention to the conduct thereof, the profits to be shared equally between them.

IX.

That said co-partnership entered upon the transaction of business in November, 1925, and that said co-partnership was terminated on or about the month of December, 1932.

X.

That, in the year 1930, Percy Adamson conceived the idea of an elastic yarn and, on July 30, 1930, filed in the United States Patent Office an application for a patent thereon. That, between July 30, 1930, and June, 1931, experimental and development work in connection with said idea was conducted and, on June 11, 1931, a new application for a patent was filed by said Percy Adamson in the United States Patent Office, which application was a continuation, in part, of the application filed July 30, 1930. That United States Letters Patent No. 1,822,847, covering an elastic yarn, was issued on such application on September 9, 1931.

XI.

That said co-partnership paid the expense of prosecuting said patent applications and, in addition thereto, incurred liability for development and experimental ex-

penses in connection therewith. That at all times prior to November 1, 1931, said invention was dealt with by James H. Adamson and Percy Adamson and was the property of said co-partnership. [78]

XII.

That the elastic yarn described in said patent and patent applications was and is known as "Lastex." That, on or about April 9, 1931, the said co-partnership filed in the United States Patent Office an application for the registration of a trademark for use in connection with the sale of such yarn, which trademark consisted of the word "Lastex" in a distinctive style of printing. That said trademark was duly registered on May 8, 1931, as the property of said co-partnership.

XIII.

That on or about April 10, 1931, Percy Adamson entered into two agreements, in writing, with the U. S. Rubber Company whereby in consideration of the license to use said invention and other consideration, including the agreement of said Percy Adamson to procure the assignment to the U. S. Rubber Company of said trademark, the U. S. Rubber Company agreed to pay to said Percy Adamson certain royalties and commissions. That said contracts were made simultaneously and as a single transaction.

XIV.

That on or about January 2, 1932, Percy Adamson and the said U. S. Rubber Company entered into two contracts, in writing, which were made in substitution and superseded the contracts made April 10, 1931.

XV.

That on or about July 7, 1931, in pursuance of said agreement made by Percy Adamson with the U. S. Rubber Company on April 10, 1931, the said co-partnership assigned to the U. S. Rubber Company the aforementioned trademark.

XVI.

That on or about November 1, 1931, Percy Adamson assumed the exclusive management of the partnership affairs without the [79] consent of James H. Adamson. That on or about March 24, 1934, Percy Adamson repudiated the existence of the partnership or any partnership obligation.

XVII

That after November 1, 1931, neither the partnership of Adamson Bros. Company nor James H. Adamson engaged in the business of developing and dealing in yarns and textiles, or in the development of ideas in the field of special yarns, nor was James H. Adamson engaged in the business of buying or selling inventions or patents.

XVIII.

That on or about May 14, 1934, James H. Adamson commenced an action in the Supreme Court of New York County against Percy Adamson for the dissolution of the partnership and for an accounting of the affairs and property of said partnership.

XIX.

That thereafter by order made and entered in said action, Harold R. Medina was duly appointed Referee to hear and determine the same. That on December 31,

1937, the said Harold R. Medina rendered his opinion in the said action and on January 8, 1938, he made his report in the said action wherein he set forth his findings of fact and conclusions of law and made his decision therein.

XX.

That thereafter and on July 8, 1939, a judgment was filed and entered in the above entitled action in accordance with the decision hereinabove referred to.

XXI.

That by said decision and judgment it was adjudicated, among other things, that James H. Adamson and Percy Adamson were each entitled to an undivided one-half share, as tenants in common, to the contracts with the U. S. Rubber Company, hereinabove referred [80] to, dated January 2, 1932, together with the invention and patent. It was further directed that Percy Adamson be directed to execute and deliver to James H. Adamson an assignment of the undivided share of the said contracts, such assignment to be made by way of confirmation and further assurance of the title to such undivided share.

XXII.

That the said judgment provided, among other things, that Percy Adamson pay to James H. Adamson the sum of \$271,044.92, together with interest and costs. That the obligation to pay said sum was discharged by agreements dated February 23, 1938, and September 11, 1939, and was completely discharged and paid prior to October 20, 1939.

XXIII.

That on or about the 20th day of October, 1939, James H. Adamson entered into an agreement with Percy Adamson and the U. S. Rubber Company wherein and whereby the said James H. Adamson did sell, assign and transfer to Percy Adamson all of his right, title and interest in and to any and all assets which formerly belonged to the partnership hereinabove referred to, between James H. Adamson and Percy Adamson, under the firm name and style of Adamson Bros. Company, consisting primarily of the following:

(a) The reversionary or other right of the certain trademark "Lastex" and the registration thereof.

(b) The certain invention for which the United States Letters Patent No. 1,822,847 was issued under date of September 8, 1931, together with all Letters Patent of foreign countries issued thereon, and all applications therefor.

(c) The two certain contracts, both dated January 2, 1932, between Percy Adamson and the U. S. Rubber Company, hereinabove described. [81]

That, in consideration of the said sale, Percy Adamson agreed to pay to James H. Adamson the sum of \$215,000, without interest, as follows:

\$5,000 upon the execution of the agreement and \$210,000 in equal installments of \$2,500 each, beginning on December 1, 1939, and, thereafter, on

the 1st day of each second month until the full balance of \$210,000 shall have been paid.

XXIV.

Plaintiffs contend that the sums received under the said contract dated October 20, 1939, for the taxable years involved constitute a capital gain, whereas the Commissioner of Internal Revenue determined that the amount received under said contract constitutes ordinary income.

CONCLUSIONS OF LAW

Pursuant to the above Findings of Fact, the court draws the following Conclusions of Law:

I.

That plaintiffs are entitled to judgment against defendant in the sum of \$2,577.52, together with interest on the said sum at the rate prescribed by law.

ORDER FOR JUDGMENT

Let judgment be entered accordingly.

Dated: This 28th day of January, 1946.

LEON R. YANKWICH

Judge [82]

Approved as to form. Zagon, Aaron and Sandler and Nathan Schwartz, by Harold E. Aaron, Attorneys for Plaintiffs; Charles H. Carr, United States Attorney, E. H. Mitchell and George M. Bryant, Assistant U. S. Attorneys, Eugene Harpole, Special Attorney, Bureau of Internal Revenue, by George M. Bryant, Attorneys for Defendant.

[Endorsed]: Filed Jan. 28, 1946. [83]

In the District Court of the United States in and for the
Southern District of California
Central Division

No. 4649-BH

JAMES H. ADAMSON and MARION C. ADAMSON,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

The above entitled matter came duly and regularly on to be heard before the undersigned, Leon R. Yankwich, one of the Judges of the above entitled court, at Los Angeles, California, on January 8, 1946, Zagon, Aaron and Sandler and Nathan Schwartz by Ray Sandler, appearing as Attorneys for the plaintiffs, and Charles H. Carr, United States Attorney, E. H. Mitchell and George M. Bryant, Assistant U. S. Attorney, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, by George M. Bryant, appearing as Attorneys for the defendant, the matter having been tried, and a Stipulation of Facts and oral evidence having been received, and argument of counsel having been heard, and the court having heretofore filed and cause to be filed its Findings of Fact, Conclusions of Law and Order for Judgment, Now Therefore,

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs [84] have and recover of the defendant the sum of Two Thousand Five Hundred Seventy-Seven Dollars Fifty-Two Cents (\$2,577.52), together with interest on said sum at the rate prescribed by law.

Dated: This 28th day of January, 1946.

LEON R. YANKWICH

Judge

Approved as to form. Zagon, Aaron and Sandler and Nathan Schwartz, by Harold E. Aaron, Attorneys for Plaintiffs; Charles H. Carr, United States Attorney, E. H. Mitchell and George M. Bryant, Assistant U. S. Attorneys, Eugene Harpole, Special Attorney, Bureau of Internal Revenue, by George M. Bryant, Attorneys for Defendant.

Judgment entered Jan. 28, 1946. Docketed Jan. 28, 1946. C. O. Book 36, page 570. Edmund L. Smith, Clerk, by John A. Childress, Deputy.

[Endorsed]: Filed Jan. 28, 1946. [85]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: James H. Adamson and Marion C. Adamson, Plaintiffs, and Messrs. Zagon, Aaron and Sandler and Nathan Schwartz, Their Attorneys:

Notice Is Hereby Given that the United States of America, the Defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 28, 1946.

Dated this 8th day of March, 1946.

CHARLES H. CARR

United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Assistant U. S. Attorneys

EUGENE HARPOLE, Special Attorney,

Bureau of Internal Revenue

By George M. Bryant

Attorneys for Defendant

[Endorsed] Filed & mailed copy to Zagon, Aaron & Sandler and Nathan Schwartz, Attys. for Plfs. Mar. 8, 1946. [86]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET CAUSE
ON APPEAL

Upon motion of defendant-appellant and good cause appearing therefor:

It Is Hereby Ordered that the time within which to file the record and docket the above entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including the 6th day of June, 1946.

Dated this 15th day of April, 1946.

LEON R. YANKWICH

United States District Judge

[Endorsed]: Filed Apr. 15, 1946. [87]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 89 inclusive contain full, true and correct copies of Complaint; Answer; Amended Answer; Stipulation of Facts; Findings of Fact, Conclusions of Law and Order for Judgment; Judgment; Notice of Appeal; Order Extending Time to Docket Cause on Appeal; and Stipulation Designating Contents of Record on Appeal which, together with copy of the Reporter's Transcript of hearing on January 8, 1946, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 24 day of July, A. D. 1946.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS

Los Angeles, California, Tuesday, January 8, 1946,
10:00 A. M.

Mr. Sandler: Your Honor, in this matter there has been a stipulation of facts which has been agreed on, containing several exhibits that I would like to have permission now to file.

The Court: The stipulation of facts will be received and marked as plaintiffs' exhibit.

Mr. Sandler: In addition to the stipulation of facts, your Honor, we have filed memorandums in this case.

The Court: I have read them.

Mr. Sandler: There was a prior proceeding in the New York court which determined the factual situation involved in the present case, and we have covered that by the stipulation. I have just one particular point. I have here the report of the referee who was appointed in that case. It is a rather voluminous report, and counsel and I do not wish to burden the record with it, but there is one particular portion on page 80 of this report, with respect to the ownership of the patent, which I don't think has been covered in the judgment. That is the invention and patent, in which the invention is embodied. I don't think there is any dispute, is there, Mr. Bryant, that that was a partnership asset?

Mr. Bryant: The facts are stipulated, that it is an asset of the partnership. [2*]

*Page number appearing at top of page of original Reporter's Transcript.

Mr. Sandler: Therefore, I don't feel any further evidence in this case is necessary. I wanted to be sure. It is stipulated that it is a partnership asset.

The Court: I have read the memoranda you have filed. The only issue in the case is whether these payments are taxable as income; isn't that correct?

Mr. Sandler: That is correct, your Honor. That is the issue.

The Court: The plaintiff contends that it is capital, and is not taxable as income.

Mr. Sandler: Yes. Mr. Adamson, will you take the stand, please?

JAMES H. ADAMSON,

the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

The Clerk: Will you state, please, your full name?

The Witness: James H. Adamson.

Direct Examination

By Mr. Sandler:

Q. Mr. Adamson, you are one of the plaintiffs in this case, are you not? A. Yes.

Q. Mr. Adamson, we have a stipulation with respect to most of the facts, and it refers to a judgment that you procured [3] against your brother, resulting out of certain litigation in the State of New York. You are familiar with that judgment, are you not? A. Yes.

Q. That particular judgment refers to a judgment in your favor, against your brother, in the sum of two hundred and seventy-one thousand and some odd dollars. Do you recall that? A. Yes.

(Testimony of James H. Adamson)

Q. After the rendition of that judgment you entered into a contract with your brother, dated October 20, 1939, whereby you sold certain items referred to in that contract. Do you remember that contract? A. Yes.

Q. Prior to the execution of that last contract, which was October 20, 1939, or thereabouts, was that two hundred and seventy-one thousand dollar judgment satisfied?

A. Yes.

Q. In other words, the payments provided in this contract constituted no part of any money judgment that was rendered by that judgment?

A. May I have that read, please?

Mr. Bryant: I am going to object to that question.

The Court: It calls for a legal conclusion. In fact, it is the question involved, whether a person, to satisfy a [4] judgment he has obtained, enters into a contract which allows the payment of the judgment over a period of years, is satisfying the judgment or entering into a separate agreement. It is one of the issues.

Mr. Sandler: I don't think so. In other words, as I read the judgment, that is a legal conclusion. It is divided into two parts: No. 1, It established an undivided half interest in the contracts. Furthermore, in the second part, it rendered a money judgment in the sum of two hundred and seventy-one thousand dollars.

The Court: That money judgment, however, was not to be paid over a period.

Mr. Sandler: That is right.

The Court: Then they agreed this money judgment should be paid over a period of years?

(Testimony of James H. Adamson)

Mr. Sandler: No, your Honor; that is what I am trying to explain. That two hundred and seventy-one thousand dollars was actually paid.

The Court: I did not so understand.

Mr. Sandler: That is a fact, your Honor. That is what I am trying to clarify.

The Court: Go ahead.

Mr. Sandler: I will ask the direct question, Mr. Adamson: Was that two hundred and seventy-one thousand dollars paid and settled aside from this contract? [5]

A. Yes.

Q. Before this contract was executed? A. Yes.

Q. Mr. Adamson, after November of 1931—under our stipulation of facts that was the date upon which your brother moved over to the United States Rubber Company—after that date did you, yourself, personally engage in any phase of the textile business? A. No.

Mr. Sandler: To go back, your Honor, and review the facts very briefly: We have here two brothers who were partners, who were engaged in the business of formulating various types of textiles and yarns. In the course of that business, according to the judgment and the decision stipulated to, and introduced here in evidence. the invention of an elastic yarn, called "Lastex," and the patent in which the invention was embodied, as well as the trademark, was a partnership asset acquired by the partnership in the course of business.

(Testimony of James H. Adamson)

Q. In 1931 did you own any patents? A. Yes.

Q. What patents, other than your interest in "Lastex," did you own?

A. A patent on a grandstand that I developed.

Q. Did you offer, or hold that patent out for sale to [6] customers? A. No.

Q. What business were you in after 1931?

A. Contracting; interior woodwork; furniture.

Q. Between the years 1931 and 1939, when you entered into this contract with your brother and the United States Rubber Company, did you offer your interest in the patent for sale to customers in the course of business?

A. No.

Q. During the year 1940, Mr. Adamson, that being the year that is involved in this present litigation, did your wife have any separate income? A. No.

Q. Did she have any deduction that she claimed under your income tax return? A. No.

Mr. Sandler: That is all.

The Court: Any questions?

Mr. Bryant: No questions.

Mr. Sandler: The plaintiff rests, your Honor.

The Court: Is there any further testimony to offer?

Mr. Bryant: No testimony.

The Court: I will hear any argument you gentlemen desire to present.

(Argument.) [7]

The Court: It seems to me that the Stilgenbaur case is binding, in the light of the stipulation of facts and in the light of the agreement which was entered into in this case. That decision holds that any method of terminating the partnership, whether it be by mutual agreement dissolving the partnership and a withdrawal of capital by one partner, or whether it be sold to outsiders, or whether it be by the legal process of dissolution, any one of these is treated by the Ninth Circuit as a sale, and taxable as capital loss or gain, and not as income.

For that reason, the judgment should be for the plaintiff, and it will be so ordered.

[Endorsed]: Filed Jul. 19, 1946. [8]

[Endorsed]: No. 11396. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. James H. Adamson and Marion C. Adamson, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed July 26, 1946.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of the United States in and for the
Ninth Circuit

No. 11396

UNITED STATES OF AMERICA,

Appellant,

v.

JAMES H. ADAMSON and MARION C. ADAMSON,

Appellees.

STIPULATION EXTENDING TIME TO DESIGNATE
CONTENTS OF RECORD ON APPEAL
AND TO DOCKET CAUSE ON APPEAL

It Is Hereby Stipulated and Agreed by and between the parties to the above entitled action, through their respective counsel undersigned, that the time to designate the contents of record on appeal and to docket cause on appeal in the above entitled matter may be extended to and including August 1, 1946.

This stipulation is entered into upon the basis that a compromise is being negotiated between the parties and the question as to appeal has not been resolved by the Solicitor General of the United States.

It Is So Stipulated.

Dated this 31st day of May, 1946.

TOM C. CLARK

Attorney General of the United States

SEWALL KEY

Acting Assistant Attorney General

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United States Attorney

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By George M. Bryant

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ZAGON, AARON AND SANDLER and

NATHAN SCHWARTS

By Ray Sandler

Attorneys for Appellee

It is So Ordered.

June 3, 1946.

ALBERT LEE STEPHENS

Judge

A True Copy. Attest: Jun. 4, 1946.

(Seal)

PAUL P. O'BRIEN,

Clerk.

[Verified.]

[Endorsed]: Filed Jun. 4, 1946. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

On appeal from the judgment in the above-entitled action the appellant will urge and rely upon the following points:

1. The District Court erred in concluding that plaintiffs are entitled to judgment against the defendant in the sum of \$2,577.52, together with interest on the said sum at the rate prescribed by law.

2. The District Court erred in that the findings of fact do not support the conclusion of law.

3. The District Court erred in that the findings of fact do not support the judgment.

4. The District Court erred in failing to conclude as a matter of law that the amounts received by the plaintiff James H. Adamson, in 1940, pursuant to an agreement dated October 20, 1939, whereby James H. Adamson sold to Percy Adamson all of his right, title and interest in and to any and all assets which formerly belonged to the partnership between James H. Adamson and Percy Adamson, under the firm name and style of Adamson Bros. Company, constituted ordinary income for federal tax purposes.

5. The District Court erred in failing to conclude as a matter of law that the income taxes involved in this action were legally and properly assessed and collected.

6. The District Court erred in ordering and entering judgment for plaintiffs and in failing to order and enter judgment for defendant.

JAMES M. CARTER

United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Assistants U. S. Attorney

EUGENE HARPOLE, Special Attorney

Bureau of Internal Revenue

By George M. Bryant

Attorneys for Appellant

* * * * *

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jul. 26, 1946. Paul P. O'Brien,
Clerk.

No. 11396

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

JAMES H. ADAMSON and MARION C. ADAMSON,

Appellees.

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

BRIEF FOR THE UNITED STATES.

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FILED
NOV 18 1946

PAUL P. O'BRIEN,
CLERK

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No. 11396

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

JAMES H. ADAMSON and MARION C. ADAMSON,

Appellees.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The District Court did not file a written opinion. Its findings of fact and conclusions of law are printed in the Record at pages 79 to 88, inclusive. The basis of the court's decision is shown in the oral statement from the Bench, printed in the Record at page 99.

Jurisdiction.

This appeal involves a suit against the United States for recovery of \$2,577.52 alleged to have been erroneously and illegally collected from the taxpayers as federal income tax, interest, and charges for the taxable year 1940. The taxpayers below duly filed a joint return of their income for the year 1940 and after the first installment of \$621.29

due thereon was paid with the filing of the return on or about March 14, 1941, they filed a timely claim on or about June 13, 1941, for refund of \$540.55 thereof which was rejected by the Commissioner of Internal Revenue on October 5, 1943. [R. 80, 81.] On or about March 10, 1943, taxpayers paid an additional sum of \$1,000 on their 1940 income tax liability, and on April 8, 1943, they paid the balance of \$867.86 tax shown to be due on their return, plus interest in the sum of \$168.11 and \$1 for release of a lien. [R. 80.] Thereafter their claim for refund upon which this action is based was filed on or about December 27, 1943, and was rejected on July 26, 1945. [R. 81.] On August 2, 1945, and within the time provided by Section 3772 of the Internal Revenue Code, this action was brought in the District Court for recovery of all but \$80.74 of the taxes, interest, and charges so paid for the year 1940. [R. 2-10, 81.] Jurisdiction was conferred on the District Court by Section 24, Fifth, of the Judicial Code. The judgment was entered on January 28, 1946. [R. 89-90.] Within three months thereof, and on March 8, 1946, a notice of appeal was filed [R. 91], pursuant to the provisions of Section 128 (a) of the Judicial Code, as amended.

Question Presented.

Whether the sum of \$32,500 received in 1940 by James H. Adamson, one of the taxpayers herein, under the circumstances shown by the Record, constituted ordinary income within the meaning of Section 22 (a) of the Internal Revenue Code, or whether it constituted gain upon the sale of a capital asset within the meaning of Section 117 (a) of the Internal Revenue Code, only 50 per centum of which should be included in taxable income.

Statute Involved.

Internal Revenue Code:

Sec. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * (26 U. S. C. 1940 ed., Sec. 22.)

Sec. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (1);

* * * * *

(b) *Percentage Taken Into Account.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized

upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 18 months;

66 $\frac{2}{3}$ per centum if the capital asset has been held for more than 18 months but not for more than 24 months;

50 per centum if the capital asset has been held for more than 24 months.

* * * * *

(26 U. S. C. 1940 ed., Sec. 117.)

Statement.

This suit was brought by James H. Adamson (herein sometimes called the taxpayer) and his wife, Marian C. Adamson, to recover all but \$80.74 which they had paid as federal income tax, interest and charges for the taxable year 1940. [R. 2-6.] The material facts were in large part stipulated [R. 11-78], and were found by the court below substantially as stipulated. [R. 79-88.] The facts are not in dispute.

On or about November 1, 1925, the taxpayer and his brother, Percy Adamson, entered into an agreement to become partners at will under the firm name and style of Adamson Brothers Company for the purpose of engaging in the business of developing and dealing in yarns and textiles, including the development of ideas in the field of special yarns. The taxpayer was to furnish sufficient capital to get started and it was agreed that both would cooperate in the management of the business with the taxpayer exercising general supervision and control and the brother devoting all of his time and attention to the

conduct thereof, the profits to be shared equally between them. The partnership entered upon the transaction of business in November, 1925, and "was terminated on or about the month of December, 1932." [R. 82-83.]

In the year 1930 Percy Adamson conceived the idea of an elastic yarn and, on July 30, 1930, filed application for patent thereon. Between July 30, 1930, and June, 1931, experimental and development work in connection with this idea was conducted and, on June 11, 1931, a new application for patent was filed by Percy Adamson, which was a continuation, in part, of the previous application, and on which a patent was issued on September 9, 1931. [R. 83.] The partnership paid the expense of prosecuting the patent applications and, in addition thereto, incurred liability for development and experimental expenses in connection therewith. At all times prior to November 1, 1931, the invention was dealt with by the taxpayer and his brother as property of the partnership. [R. 83-84.]

The elastic yarn described in the patent issued to Percy Adamson was and is known as "Lastex." On or about April 9, 1931, the partnership filed an application for registration of a trademark for use in connection with the sale of the yarn, which trademark was duly registered on May 8, 1931, as the property of the partnership. [R. 84.]

On or about April 10, 1931, Percy Adamson entered into two written agreements with the United States Rubber Company which were superseded by two written agreements entered into by him and the company on or about January 2, 1932, whereby in consideration of the license to use the invention covered by the "Lastex" patent issued to Percy Adamson, and other consideration, including the

agreement of Percy Adamson to procure the assignment to United States Rubber Company of the "Lastex" trademark, the company agreed to pay Percy Adamson certain royalties and commissions. [R. 84.] The "Lastex" trademark was assigned by the partnership to United States Rubber Company on or about July 7, 1931, pursuant to the agreement of April 10, 1931. [R. 85.]

On or about November 1, 1931, Percy Adamson assumed exclusive management of the partnership affairs of Adamson Brothers Company without the consent of the taxpayer, and on or about March 24, 1934, he repudiated the existence of the partnership or any partnership obligation. [R. 85.]

After November 1, 1931, neither the partnership of Adamson Brothers Company nor the taxpayer engaged in the business of developing or dealing in yarns and textiles, or in the development of ideas in the field of special yarns, nor was the taxpayer engaged in the business of buying or selling inventions or patents. [R. 85.]

On or about May 14, 1934, the taxpayer commenced an action in the Supreme Court of New York County against Percy Adamson for dissolution of the partnership of Adamson Brothers Company and for an accounting of the affairs and property of the partnership. A referee was appointed to hear the action. On December 31, 1937, he rendered his opinion and on January 8, 1938, made his report [R. 21-40, 85-86], which was made the basis of a judgment entered by the court on July 8, 1938. [R. 41-47, 86.] The judgment entered July 8, 1938, among other

things, held in effect that there had been a partnership between the taxpayer and his brother, that the "Lastex" patent and trademark were property of the partnership, and that the taxpayer was entitled to share as a partner in the royalties and commissions paid and to be paid by United States Rubber Company under the agreements of January 2, 1932, with Percy Adamson. In connection with the partnership accounting the court awarded the taxpayer judgment against his brother for \$271,044.92 plus interest and costs, and awarded the taxpayer and his brother each an undivided one-half share as a tenant in common in the contracts between Percy Adamson and the United States Rubber Company dated January 2, 1932, and to all payments due or to grow due under the contracts subsequent to September 30, 1937, in the case of the contract covering royalties and subsequent to December 31, 1936, in the case of the contract covering services, except that Percy was entitled to retain a salary of \$7,800 per year under the latter contract. [R. 41-47, 86.]

That part of the judgment of July 8, 1938, requiring payment by Percy Adamson to the taxpayer of \$271,044.92 plus interest and costs was satisfied prior to the taxable year here involved and is not involved in this proceeding. [R. 96-97.]

Under date of October 20, 1939, and subsequent to the entry of the judgment of July 8, 1938, the taxpayer, his brother, his attorneys to whom he had assigned an interest in the judgment, and the United States Rubber Company entered into a contract [R. 48-78] which gives rise to the

present controversy. Under this agreement the taxpayer sold to Percy Adamson all of his right, title, and interest in and to all assets of the partnership of Adamson Brothers Company, consisting primarily of the "Lastex" patent and trademark and the agreements dated January 2, 1932, between Percy Adamson and the United States Rubber Company. It was stipulated [R. 19], and the court below found [R. 87], that in consideration for the sale Percy Adamson agreed to pay the taxpayer \$215,000, without interest, the sum of \$5,000 to be paid upon execution of the agreement and the balance to be paid in equal installments of \$2,500 each, beginning on December 1, 1939, and thereafter on the first day of each second month until the full amount was paid. The agreement itself, however, a copy of which was made a part of the stipulation [R. 19, 48-60], provided that the \$215,000 should be paid to the taxpayer by United States Rubber Company. [R. 58-59.] Furthermore, the agreement of October 20, 1939, does not indicate that the payments in question were to be made on behalf of Percy Adamson, or that they were to be charged to his account by United States Rubber Company.

In any event the taxpayer received payments in 1940, the taxable year here involved, under the contract of October 20, 1939, aggregating \$32,500 which he reported in the joint income tax return filed for that year for himself and his wife as income from royalties. [R. 12, 13, 80-81.] This joint return indicated a total tax due of \$2,489.15, of which \$621.29 was paid with the filing of the return. [R. 80.] Thereafter, and before the balance

of the tax due was paid, the taxpayer filed a claim for refund of \$540.55, on the assumption that the total tax due on their joint income for 1940 was \$80.74. The ground on which this claim was based was that, "Due to error, profit on sale of patent was included as income from royalties instead of a long term gain." [R. 81-82.] This claim was rejected by the Commissioner of Internal Revenue and thereafter the balance of the tax, plus interest and charges, was paid as stated above, and on December 27, 1943, the taxpayer filed a new claim for refund, on which this action is based, in which the ground for refund was stated to be that the taxpayer "erroneously reported a long term gain on the sale of capital assets as income from royalties." The statement accompanying the claim further asserts that the taxpayer sold to his brother, on or about October 20, 1939, "all of his right, title and interest in and to" the partnership of Adamson Brothers Company, and that the profit should be taxed as a capital gain rather than income from royalties. [R. 81-82.]

Upon rejection of the above claim for refund this suit was filed in the court below. [R. 2-6, 11-12, 81.] The court below held, on authority of *Stilgenbauer v. United States*, 115 F. (2d) 283 (C. C. A. 9th), that the taxpayer had, by the agreement of October 20, 1939, sold a capital asset only 50 per cent of which should be reported as income. [R. 88, 99.] Judgment was entered for the taxpayer [R. 89-90], and this appeal followed. [R. 91.]

Statement of Points to Be Urged.

The Government relies upon the following errors as a basis for this appeal [R. 102-103]:

1. The District Court erred in concluding that taxpayers are entitled to judgment against the Government in the sum of \$2,577.52, together with interest on that sum at the rate prescribed by law.

2. The District Court erred in that the findings of fact do not support the conclusion of law.

3. The District Court erred in that the findings of fact do not support the judgment.

4. The District Court erred in failing to conclude as a matter of law that the amounts received by the taxpayer in 1940, pursuant to an agreement dated October 20, 1939, whereby James H. Adamson sold to Percy Adamson all of his right, title and interest in and to any and all assets which formerly belonged to the partnership between James H. Adamson and Percy Adamson, under the firm name and style of Adamson Brothers Company, constituted ordinary income for federal tax purposes.

5. The District Court erred in failing to conclude as a matter of law that the income taxes involved in this action were legally and properly assessed and collected.

6. The District Court erred in ordering and entering judgment for taxpayers and in failing to order and enter judgment for the Government.

Summary of Argument.

This is a suit against the United States for a refund of amounts paid as taxes, interest, and charges in which the burden is upon the taxpayer to show he actually overpaid his taxes. This he has failed to do. The basis of his suit is that certain sums which he received during the taxable year represented consideration received upon the sale of "capital assets" as defined in the Internal Revenue Code rather than ordinary income as reported in his tax return. The court below appears to have sustained the taxpayer on the assumption that he sold his interest in a partnership and that such partnership interest was a "capital asset." But this assumption is not justified since the partnership had previously been liquidated and all he actually sold consisted principally of his undivided one-half interest as tenant in common in certain assets which at one time had been partnership property. The evidence does not justify a conclusion that all of the assets transferred were capital assets, nor does it permit any allocation of the payments received between capital assets and the amount received as consideration for the surrender of the taxpayer's right to receive future royalty income. The payments involved were properly reported as ordinary income and the refund sought should be denied.

ARGUMENT.

Amounts Received by Taxpayer Pursuant to the Agreement of October 20, 1939, Are Not Taxable as Capital Gain.

A. TAXPAYER HAS FAILED TO PROVE HE OVERPAID HIS TAX FOR THE YEAR INVOLVED.

This is a suit against the United States to recover amounts paid as federal income tax, interest, and charges. It is axiomatic that in such an action the burden is upon the taxpayer to prove that he actually has overpaid his taxes. *Lewis v. Reynolds*, 284 U. S. 281, 283. See, also, *Helvering v. Taylor*, 293 U. S. 507, 514, and *Champ Spring Co. v. United States*, 47 F. (2d) 1 (C. C. A. 8th), certiorari denied, 283 U. S. 852.

In this case there is no controversy over the amount of income or profit received in the year 1940 under the contract of October 20, 1939, although there is some doubt as to whether the correct amount has been reported. The principal question is whether the amount received is taxable as ordinary income or as gain from the sale of a capital asset.

The taxpayer's claim here is based upon the ground that the amount involved represents gain from the sale of a capital asset. This places a further burden of proof upon the taxpayer which we submit has not been met.

All income is included generally in gross income under Section 22(a) of the Internal Revenue Code, *supra*, for purposes of the income tax. One of the exceptions to this general rule is contained in Section 117(b) of the Internal Revenue Code, *supra*, which, in so far as this appeal is concerned, provides that only 50 per centum of the gain from the sale of a capital asset shall be included in tax-

able income. The term "capital asset" is defined in Section 117(a) of the Internal Revenue Code, *supra*, as "property held by the taxpayer (whether or not connected with his trade or business)," but does not include stock in trade or other property of a kind which would be included in inventory if on hand at the end of the year, or property held primarily for sale in the ordinary course of his trade or business or property, used in his trade or business, of a character which is subject to the allowance for depreciation. *Cf. Commissioner v. Boeing*, 106 F. (2d) 305 (C. C. A. 9th), certiorari denied, 308 U. S. 619.

The provisions for taxation of capital gains and losses is an exception to the general rule of taxing income and were designed to relieve taxpayers of the excessive burdens otherwise resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conversions. *Helvering v. N. Y. Trust Co.*, 292 U. S. 455, 466; *Burnet v. Harmel*, 287 U. S. 103, 106; *Kenan v. Commissioner*, 114 F. (2d) 217, 220 (C. C. A. 2d). Like other provisions authorizing deductions, exemptions, credits, and other tax benefits, this provision must be strictly construed. *Helvering v. Northwest Steel Mills*, 311 U. S. 46, 49. Such benefits are granted as a matter of legislative grace, and any person claiming any such benefits must bring himself squarely within the provisions of the statute authorizing such relief or benefits. *Deputy v. du Pont*, 308 U. S. 488, 493; *New Colonial Co. v. Helvering*, 292 U. S. 435, 444; *Helvering v. Northwest Steel Mills*, *supra*. We submit the taxpayer has not brought himself within the provisions relating to the taxation of capital gains and losses as defined in Section 117(a) of the Internal Revenue Code.

It was stipulated [R. 18-19], and the court below found [R. 87-88], that the taxpayer, his brother (Percy Adamson), and the United States Rubber Company entered into an agreement [R. 48-60], under date of October 20, 1939, under which the taxpayer sold to his brother all of his right, title, and interest "in and to any and all assets which formerly belonged to the partnership" of Adamson Brothers Company for a consideration of \$215,000 to be paid \$5,000 upon execution of the agreement and installments of \$2,500 on December 1, 1939, and the first of each second month thereafter until the full amount was paid.

The agreement itself, however, states that the taxpayer sold all of his right, title, and interest in, to and under the "certain partnership which formerly existed" between the brothers, "as well as the certain corporation, Adamson Bros. Company, Inc., * * * which later succeeded the said partnership," and the capital stock and obligations thereof, all monies, trade marks, trade names, etc., "which belonged, or belongs," to either the former partnership or to the successor corporation, "which said assets include, or may include, among other things" the "Lastex" patent and trademark and the royalty and service agreements with United States Rubber Company. [R. 52-53.] There is no further indication, either in the agreements of the parties or elsewhere in the record, as to the nature or extent of other assets covered by the sale, or whether such other assets, if any, were "capital assets" within the meaning of Section 117(a), or whether they were held for the length of time required by Section 117(b). To that extent the evidence is insufficient to support the judgment below. *Kessler v. United States*, 124 F. (2d) 152 (C. C. A. 3d); *Lewis v. Reynolds*, *supra*.

In another respect the taxpayer has failed to prove that he actually overpaid his tax for 1940. The record shows that prior to October 20, 1939, the taxpayer had entered into agreements with the attorneys who represented him in the New York litigation whereby, among other things, he assigned them an interest in the judgment of July 8, 1938, as compensation for services rendered. [R. 61-78.] The attorneys, as parties to the agreement of October 20, 1939, thereunder surrendered all rights which they had in the judgment and relinquished their rights under the earlier agreements with the taxpayer. [R. 54-58.] In consideration therefor the United States Rubber Company (which agreed to pay the taxpayer the \$215,000) agreed to pay taxpayer's attorneys the sum of \$110,000, without interest, of which \$60,000 was to be paid simultaneously with the execution of the agreement and \$50,000 to be paid on January 2, 1940. [R. 58.] The stipulation and the findings of the court below are silent with respect to this part of the agreement. But it is apparent from the agreements themselves [R. 48-78] that at least a substantial part of the amount was to be paid to the attorneys in discharge of the taxpayer's obligation to compensate them for services rendered. If this were so, the amount paid to them for that purpose would constitute income to the taxpayer in the year paid. *Old Colony Tr. Co. v. Commissioner*, 279 U. S. 716; *United States v. Boston & M. R. Co.*, 279 U. S. 732. Neither the stipulation nor the findings indicate whether the payment of \$50,000 was made in 1940, but if it was it is apparent that it was not taken into account in determining the taxpayer's liability for that year. [R. 11-12, 80.] If taken into account in determining the taxpayer's liability for the year involved there apparently would be

no refund due him, even on his theory that amounts paid under the agreement represent capital gain. *Cf. Lewis v. Reynolds, supra.* Hence, in this respect the taxpayer is not entitled to judgment on the record. *Cf. Kessler v. United States, supra.*

B. THE AMOUNT INVOLVED IS NOT SHOWN TO BE PAYMENT FOR "CAPITAL ASSETS" WITHIN THE MEANING OF THE APPLICABLE STATUTES.

It is clear from the referee's report [R. 21-40], the judgment of July 8, 1938 [R. 41-46], and the testimony [R. 96-97], that when the agreement of October 28, 1939, was entered into the partnership of Adamson Brothers Company had been dissolved and liquidated, the money judgment in taxpayer's favor had been satisfied, and the only vestige of his former partnership interest was an undivided one-half interest as tenant in common in the "Lastex" patent and trademark and an undivided one-half interest as tenant in common in the royalty and service agreements with the United States Rubber Company. Accordingly, if we assume, for purposes of argument, that the taxpayer sold only assets "which formerly belonged to the partnership," consisting of his undivided one-half interest in the assets listed in the stipulation and findings of the court below [R. 19, 87], it still cannot be said that the taxpayer sold an interest in a partnership, as such, and such cases as *Commissioner v. Shapiro*, 125 F. (2d) 532 (C. C. A. 6th); *Thornley v. Commissioner*, 147 F. (2d) 416 (C. C. A. 3d), and *Humphrey v. Commissioner*, 32 B. T. A. 280, whether right or wrong, have no application here.

Considered separately from his interest in the royalty agreements, if we assume that the taxpayer's interest in the patent and trademark represented "capital assets" within the meaning of the statute, still there is nothing in the record to show their cost, if any, and nothing to show what part of the consideration paid or to be paid to the taxpayer under the agreement of October 20, 1939, was applicable to his interest in the patent and trademark. Hence there is nothing to show the gain, if any, applicable to this part of the sale. *Cf. City Bank Farmers Trust Co. v. United States*, 47 F. Supp. 98 (C. Cls.); *City Bank Farmers Trust Co. v. United States*, 47 F. Supp. 105 (C. Cls.).

According to the terms of the agreement of October 20, 1939, however, the taxpayer also sold to his brother all of his right, title, and interest in and to the judgment obtained against his brother on July 8, 1938, "and all monies due, and to grow due, thereunder, and the whole, as well as each and every part, thereof." [R. 53.] This judgment [R. 41-46], among other things, awarded the taxpayer the sum of \$271,044.92 plus interest and costs. If the money judgment had already been satisfied [R. 96-97], this part of the agreement of October 20, 1939, apparently applied to that part of the judgment fixing the taxpayer's interest in the "Lastex" patents and his right to share in the future income to be derived from the royalty and service agreements with United States Rubber Company, or any such agreements made in the future, plus any amounts accruing subsequent to the period covered by the judgment which may then remain unpaid. To the extent that any part of the consideration received by the taxpayer under the agreement of October 20, 1939, represented consideration for anything conveyed or re-

linquished pursuant to this paragraph it could not constitute payment for a capital asset.

Furthermore, we submit that no part of the payments made or to be made to the taxpayer under the agreement of October 20, 1939, which represented payment for release of his right to receive future income under the royalty and service agreements with the United States Rubber Company can be treated as payment for a "capital asset" within the intendment of the Revenue Acts.

See:

Hort v. Commissioner, 313 U. S. 28;

Helvering v. Smith, 90 F. (2d) 590 (C. C. A. 2d).

The duration or nature of the royalty and service agreements between Percy Adamson and the United States Rubber Company are not disclosed by the record. But if the amount of money judgment awarded the taxpayer as his share of the partnership profits can be taken as a criterion it would seem that a very substantial part, if not all, of the consideration paid or to be paid to the taxpayer under the agreement of October 20, 1939, was paid to secure release of his right to share in the future income to be derived from royalties. Any amounts which the taxpayer was entitled to receive under the royalty and service agreements with the United States Rubber Company would constitute ordinary income, and we know of no authority which would justify holding that consideration received for the release or surrender of that right constitutes proceeds from the sale of a capital asset.

This case, in this respect, does not differ materially from *Helvering v. Smith*, *supra*. In the latter the tax-

payer, after having been a partner in a law firm for five years, retired and the firm was dissolved. The partnership agreement provided that upon dissolution the majority of those remaining partners should liquidate the firm, and that any retiring partner should not be entitled to any part of any earnings for services performed after dissolution, but should receive in full satisfaction of his interest his proportion of all earnings collected and of all amounts subsequently collected for services already performed. At the time of retiring the taxpayer released his partners from all liability upon dissolution in consideration for a cash payment of \$125,000, which was estimated to be the amount that would eventually be due him under the dissolution provisions of the partnership agreement. The Circuit Court of Appeals held that the partnership interest which the taxpayer relinquished was not a capital asset within the meaning of the statute and the amount which he received was a substitute for the right to receive future income.

See, also:

Doyle v. Commissioner, 102 F. (2d) 86 (C. C. A. 4th).

Even more pertinent to the present situation, although not involving any elements of partnership, is *Hort v. Commissioner*, *supra*. In that case the taxpayer claimed that an amount which he received during the taxable year in consideration for cancellation of a long term lease on property owned by him constituted capital gain. The Supreme Court held that the amount received for surrender of his right to receive future income was taxable as ordinary income. In discussing the capital gains

and losses provisions of the statute, as applicable to circumstances there involved, the Court said (pp. 30-31):

The amount received by petitioner for cancellation of the lease must be included in his gross income in its entirety. Section 22 (a), copied in the margin, expressly defines gross income to include "gains, profits, and income derived from . . . rent, . . . or gains or profits and income derived from any source whatever." Plainly this definition reached the rent paid prior to cancellation just as it would have embraced subsequent payments if the lease had never been cancelled. It would have included a prepayment of the discounted value of unmatured rental payments whether received at the inception of the lease or at any time thereafter. Similarly, it would have extended to the proceeds of a suit to recover damages had the Irving Trust Co. breached the lease instead of concluding a settlement. Compare *United States v. Safety Car Heating Co.*, 297 U. S. 88; *Burnet v. Sanford*, 282 U. S. 359. That the amount petitioner received resulted from negotiations ending in cancellation of the lease rather than from a suit to enforce it cannot alter the fact that basically the payment was merely a substitute for the rent reserved in the lease. So far as the application of Sec. 22 (a) is concerned, it is immaterial that petitioner chose to accept an amount less than the strict present value of the unmatured rental payments rather than to engage in litigation, possibly uncertain and expensive.

The consideration received for cancellation of the lease was not a return of capital. We assume that the lease was "property," whatever that signifies abstractly. Presumably the bond in *Helvering v. Horst*, 311 U. S. 112, and the lease in *Helvering v.*

Bruun, 309 U. S. 461, were also "property," but the interest coupon in *Horst* and the building in *Bruun* nevertheless were held to constitute items of gross income. Simply because the lease was "property" the amount received for its cancellation was not a return of capital, quite apart from the fact that "property" and "capital" are not necessarily synonymous in the Revenue Act of 1932 or in common usage. Where, as in this case, the disputed amount was essentially a substitute for rental payments which Sec. 22 (a) expressly characterizes as gross income, it must be regarded as ordinary income, and it is immaterial that for some purposes the contract creating the right to such payments may be treated as "property" or "capital."

Finally, even if this case be considered as the transfer or assignment of an interest in a defunct partnership we submit the court below erred in holding that the consideration therefor received by the taxpayer constituted payment for "capital assets" within the meaning of the statute.

Beginning with the Income Tax Act of 1913, c. 16, 38 Stat. 114, 166, Sec. II D, except for the profits tax imposed under the Revenue Act of March 3, 1917, c. 159, 39 Stat. 1000, Sec. 201, partnerships have not been treated as a separate taxable entity. See *Craik v. United States*, 31 Fed. Supp. 132 (C. Cls.); *Neuberger v. Commissioner*, 311 U. S. 83, and *Commissioner v. Lamont*, 156 F. (2d) 800 (C. C. A. 2d), in which the history of the taxing provisions relating to the taxation of partnership income is discussed at some length. Partnerships have not even been treated as a tax computing entity. *Neuberger v. Commissioner*, *supra*. The taxing acts

have been based upon the common law conception of joint ownership of property and profits and joint responsibility for partnership obligations. *Helvering v. Smith*, 90 F. (2d) 590 (C. C. A. 2d.) Accordingly, instead of taxing partnerships the individual partners have been made liable for their distributive share of partnership profits and losses.

Many cases have been decided in which this principle of taxation has been applied to gains or losses realized by individuals as a result of shifting or termination of partnership interest, distribution of partnership assets, or liquidation of the partnership. The position taken by the Commissioner with respect to the application of the capital gains and losses provisions of the statute to many such transactions is illustrated in Sol. Op. 42, 3 Cum. Bull. 61 (1920), G. C. M. 10092, XI-1 Cum. Bull. 114 (1932); G. C. M. 11557, XII-1 Cum. Bull. 128 (1933), and G. C. M. 20251, 1938-2 Cum. Bull. 169.

The majority of cases involving application of the taxing provisions of the statute to rearrangement, termination, or disposition of the partnership interest fall generally into one of three groups. One such group involves application of the provisions to cases where the partnership has sold capital assets and the proceeds have been paid to a partner or held to his credit by the partnership. In such cases the courts seem to have uniformly applied the joint ownership and joint obligation theory rather than any theory of separate entity. Representative of

this group are cases like *United States v. Coulby*, 251 Fed. 982 (N. D. Ohio), affirmed, 258 Fed. 27 (C. C. A. 6th); *Central Hanover Bank & Trust Co. v. United States*, 35 F. Supp. 764 (C. Cls.); *Neuberger v. Commissioner*, *supra*, and *Craik v. United States*, *supra*. See also, *Helvering v. Walbridge*, 70 F. (2d) 683 (C. C. A. 2d), *certiorari* denied, 293 U. S. 594.

A second group of such cases involves application of the taxing provisions where capital assets are transferred from the partnership to a partner and sold by him. In such cases the courts also seem to have followed the co-ownership theory rather than any theory of separate entity in holding that gain or loss is not recognized at the time of distribution. Cf. *Munson v. Commissioner*, 100 F. (2d) 363 (C. C. A. 2d); *Crawford v. Commissioner*, 39 B. T. A. 521; *McClellan v. Commissioner*, 42 B. T. A. 124, affirmed, 117 F. (2d) 988 (C. C. A. 2d). This was the substance of what took place in *Stilgenbauer v. United States*, 115 F. (2d) 283, decided by this Court, and upon authority of which the decision below purports to have been based. [R. 99.]

The third group are cases where the partner has disposed of his entire interest in the partnership. But with the exception of the *Shapiro*, *Thornley*, and *Humphrey* cases cited above, and *Hill v. Commissioner*, 38 F. (2d) 165 (C. C. A. 1st), the authorities seem to require determination of the tax liability involved on the theory of co-ownership of assets rather than upon any theory

of separate entity. Cf. *Harris v. Commissioner*, 39 F. (2d) 546 (C. C. A. 2d); *Rossmore v. Commissioner*, 76 F. (2d) 520 (C. C. A. 2d); *Jennings v. Commissioner*, 110 F. (2d) 945 (C. C. A. 5th), *certiorari* denied, 311 U. S. 904; *Benjamin v. Hoey*, 135 F. (2d) 945 (C. C. A. 2d); *Williams v. McGowan*, 152 F. (2d) 570 (C. C. A. 2d); *City Bank Farmers Trust Co. v. United States*, 47 Fed. Supp. 98 (C. Cls.); *Munson v. Commissioner*, *supra*; *Helvering v. Smith*, *supra*.

In basing its decision upon the decision of this Court in *Stilgenbauer v. United States*, *supra*, we submit the court below completely misconstrued the *Stilgenbauer* opinion. In its statement the court below said [R. 99]:

That decision holds that any method of terminating the partnership, whether it be by mutual agreement dissolving the partnership and a withdrawal of capital by one partner, or whether it be sold to outsiders, or whether it be by the legal process of dissolution, any one of these is treated by the Ninth Circuit as a sale, and taxable as capital loss or gain, and not as income.

We submit neither the *Stilgenbauer* case nor any other case stands for this broad proposition. In the *Stilgenbauer* case, page 285, the taxpayer, for a money consideration, transferred to his two partners "all his right, title and interest in and to the specific partnership property." The court pointed out that under California law two other methods of disposing of his partnership interest were available to him. As to the tax consequence, if he had adopted a different method the court said (p. 287) the fact that there is involved the same value to the retiring partner "does not make one taxable process nontaxable because another, nontaxable, is not chosen." In

that case the Commissioner determined the taxpayer's co-ownership interest in specific partnership property to be capital assets and his decision in this respect was sustained.

While the New York law with respect to the rights of partners is the same as that of California (*Hekering v. Smith, supra*), the situation in the instant case is materially different. Here the partnership had been dissolved. All the taxpayer retained at the time of the sale was an undivided one-half interest as tenant in common in certain property which had been property of the former partnership. As pointed out above, it has not been shown that the consideration received by the taxpayer was paid to him as consideration for the sale of capital assets as defined by the statute. He properly reported such payments as ordinary income and the refund should be denied.

Conclusion.

The decision below is wrong. It is contrary to the facts and the law and should be reversed.

Respectfully submitted,

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November, 1946.

No. 11396

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

JAMES H. ADAMSON and MARION C. ADAMSON,

Appellees.

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

BRIEF FOR JAMES H. ADAMSON AND
MARION C. ADAMSON, APPELLEES.

FILED

JAN 2 - 1917

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I.

Preliminary Statement.

As indicated in the appellant's brief, the facts in this case are not in dispute and substantially all the facts, as well as the issue involved, were stipulated. Because of the complete statement of the facts set forth in appellant's brief, appellees will merely refer to the record wherever indicated in their argument.

II.

Question Presented.

Appellees concur in appellant's statement of the question presented by this appeal, which is whether the sum of \$32,500.00 received in 1940 by James H. Adamson under the agreement of October 20, 1939, constituted ordinary income or whether it constituted gain upon the sale of a capital asset within the meaning of the Internal Revenue Code.

III.

Argument.

It is appellees' position that James H. Adamson, one of the taxpayers herein, by the said agreement dated October 20th, 1939 [R. 48-60], sold to his brother, Percy Adamson, either of the following:

1. His interest in the partnership of Adamson Bros. Company, or
2. An undivided one-half interest in the United States Rubber Company contracts, the invention, the patent, and in the trademark "Lastex."

Regardless of which of the foregoing the said transaction is deemed to be, the payments received under said contract would nevertheless constitute a long-term capital gain within the meaning of the Internal Revenue Code.

The facts in the instant case are clear and simple when stripped of many irrelevant circumstances. James H. Adamson and his brother entered into a partnership at will in 1925 to engage in the business of developing and dealing in yarns and textiles, including the developing of ideas in the field of special yarns. [R. 14.] In the course of that business, one of the partners, Percy Adamson, developed an idea for the manufacture of a yarn known as "Lastex," which he patented. [R. 15.] This invention, as well as the patent in which it was embodied, together with the trademark "Lastex," was owned by and was the property of the copartnership. [R. 15.]

In April, 1931, and January, 1932, Percy Adamson entered into two contracts with the United States Rubber Company in connection with the use and license of the patent and trademark [R. 16], which contracts, as the

court later determined, were likewise the property and assets of the copartnership. [R. 37.] Percy Adamson thereafter repudiated the partnership which necessitated litigation to establish James H. Adamson's interest in the assets which Percy claimed to be his own. [R. 17.] The partnership terminated December, 1932. [R. 14.] From that time on, James H. Adamson was no longer engaged in any business pertaining to developing and dealing in yarns and textiles or in the developing and selling of inventions, patents or trademarks. [R. 97-98.] It is obvious therefore that he held his interest in the assets which belonged to the partnership as an investment and not for use or sale to customers in the course of operation of any business.

By the agreement of October 20th, 1939, James H. Adamson sold all of his right, title and interest in all of the said assets or in the partnership to his brother, Percy Adamson. [R. 48-60.] It is the nature of the proceeds from this sale which is the subject of this controversy. Is it ordinary income or is it a long-term capital gain?

It is apparent from the facts that the income in question was the proceeds from the sale of either the partnership interest or of the undivided one-half interest in the specific assets. Appellees submit that it is immaterial which of the two James H. Adamson sold because the sale of either would constitute the sale of a capital asset under the circumstances of this case.

The Tax Court of the United States, in considering the identical question in a proceeding involving the year 1939, has ruled that by the contract of October 20, 1939, James H. Adamson "disposed of *all* his interest in the then remaining assets of the partnership, including the Rubber

Company contracts and any interest he may then have had in the patent and trademark, which although the partnership had been terminated had not theretofore been divided and distributed.” (*James H. Adamson v. Commissioner of Internal Revenue*, Docket No. 3154, decided December 11th, 1946, T. C.) The Tax Court concluded that the payments received by James H. Adamson under the said contract of October 20th, 1939, “constituted proceeds from the sale of capital assets and that it is subject to tax at long term capital gain rates under Sections 117(a) and (b) of the Code.”

Other courts have held that the sale of assets of the type sold by the agreement of October 20th, 1939, constituted the sale of capital assets. In *Anna Taylor*, 3 B. T. A. 1201, and *Alice G. K. Klaberg*, 2 T. C. 1024, the sale of a royalty agreement was held to be to sale of a capital asset. In *Commissioner v. Hopkinson* (C. C. A. 2), 127 F. (2d) 406, and in *Commissioner v. Celanese Corporation of America*, 140 F. (2d) 339, the sale of a patent was held to be the sale of a capital asset. In *Seattle Brewing Company*, 6 T. C., and *Rainier Brewing Company*, 7 T. C., the sale or purchase of a trade name was held to be the sale of a capital asset. In *Stilgenbauer v. U. S.* (C. C. A. 9), 115 F. (2d) 283, the sale of a copartnership interest in personal property was held to be the sale of a capital asset.

Since the invention, patent, trademark and the United States Rubber Company contracts were all acquired by the partnership during the years 1931 and 1932, and disposed of on October 20, 1939, they were held by the taxpayer for more than 24 months. See G. C. M. 20251.

From the language of the agreement of October 20, 1939, it might also be construed that James H. Adamson was disposing of his interest in the partnership of Adamson Bros. Company, as distinguished from his interest in the specific assets. Although it is true that the partnership was terminated on or about the month of December, 1932, it might nevertheless be deemed to have continued in existence for the purpose of winding up and completing the executory contracts with the United States Rubber Company. Under the circumstances, it might be deemed that what James H. Adamson sold under the contract of October 20th, 1939, was an interest in the partnership.

The sale of the partnership interest has been held to be the sale of capital assets under the circumstances of this case.

Thornly v. Commissioner (C. C. A. 3), 147 F. (2d) 416;

Commissioner v. Shapiro (C. C. A. 6), 125 F. (2d) 532;

Dudley T. Humphrey, 32 B. T. A. 280;

Estate of George R. Nutter, 46 B. T. A. 35;

Kessler v. U. S., 124 F. (2d) 152;

Stilgenbauer v. U. S., *supra*,

Tehman, 7 T. C., No. 128.

Appellees submit that the alleged inconsistency in the agreement of October 20th, 1939, as to whether the said agreement disposes of an interest in a partnership or an interest in specific assets is immaterial, as the purpose of the clause was to give the buyer further assurance of his title and for the purpose of securing to the purchaser

the absolute and exclusive ownership, possession and title to the property sold. See

Seattle Brewing Company, 6 T. C., and
Commissioner v. Celanese Corporation of America,
supra.

Prior to the execution of the agreement, the taxpayer owned an interest in the partnership, even though it was inactive. After the execution of the instrument, he owned no interest in the partnership. Before the execution of the said contract, Percy Adamson owned a copartnership interest in the partnership. After the execution of the said contract, he was the sole and absolute owner thereof. This constitutes a sale of a partnership interest.

Seattle Brewing Company, *supra*;
Commissioner v. Hopkinson, *supra*;
Thornly v. Commissioner, *supra*.

Assuming that the property received by Percy Adamson consisted of an interest in specific assets this would not take the transaction out of Section 117(b) of the Internal Revenue Code. This section applies whether the transaction be a sale or an exchange. If the taxpayer gives up his partnership interest and his purchaser pays him the consideration therefor, then the proceeds received by the taxpayer are from an exchange, whether or not his purchaser receives the same assets which the taxpayer gives up.

Kessler v. U. S., *supra*;
Thornly v. Commissioner, *supra*.

The sale or exchange of the partnership interest which was acquired in November, 1925, and disposed of on October 20, 1939, resulted in a long-term capital gain.

IV.

Reply to Appellant's Argument.

While it is true that in a suit against the United States to recover amounts paid as federal income tax the burden is upon the taxpayer to prove that he actually has overpaid his taxes, we submit the taxpayer has sustained the burden in the present case.

It is an elementary principle of law that requires no citation of authority that the findings of the trial court are to receive such consideration as will uphold rather than defeat its judgment thereon and wherever from the facts found by it, other facts may be inferred which will support the judgment, such inferences will be deemed to have been made and upon an appeal from the judgment, the Appellate Court will not draw from those facts any inferences of fact contrary to that which may have been drawn by the trial court for the purpose of rendering judgment.

The trial court's findings of facts are not to be disturbed upon review if there is any evidence to support such findings, and this is so even where there is a conflict in the evidence.

Wells Fargo Bank etc. v. McLaughlin (C. C. A. 9), 78 F. (2d) 934, certiorari denied 296 U. S. 638;

United States v. Union Trust Co. (C. C. A. 7), 90 F. (2d) 702.

The appellant urges that appellees have not brought themselves squarely within the provisions for taxation of capital gains because there is no indication either in agreements or in the record as to the nature or extent of other

assets covered by the sale or whether such other assets, if any, were capital assets within the meaning of Section 117(a) or whether they were held for the length of time within the meaning of Section 117(b). In this regard we respectfully submit that the position of the appellant is without merit.

There was not even a shred of evidence to indicate that there were any assets the subject of the contract in question other than the invention, the patent, the trademark and the United States Rubber Company contracts. It is quite obvious from a consideration of the agreement of October 20th, 1939, that the parties used general language to give the purchaser further assurance that he was receiving clear title to the particular assets conveyed rather than any intimation that there were any other assets. The trial court obviously so construed the agreement.

The action brought by James H. Adamson in the Supreme Court of New York against Percy Adamson was "for a disposition of the partnership and for an accounting of the affairs and the property of said partnership. [R. 17.] It is apparent from the record that the Supreme Court of the State of New York by its judgment intended to and did settle the accounts of the partnership and divided and distributed all of the assets of the partnership. [R. 42-46.] An examination of the findings of fact, the conclusions of law and the judgment made and entered in the New York action shows that there were no other assets or property of any kind and nature belonging to the partnership which could be the subject of sale contemplated by the agreement of October 20th, 1939, except the specific items enumerated in said agreement, to wit: The invention, the patent, the trademark and the United States Rubber Company contracts. As heretofore indi-

cated, the Tax Court likewise ruled as did the trial court that by the contract James H. Adamson “disposed of *all* his interest in the then remaining assets of the partnership.”

Adamson v. Commissioner, supra.

The government admits in its brief at page 16:

“The only vestige of his former partnership interest was an undivided one-half interest as tenant in common in the ‘Lastex’ patent and trademark and an undivided one-half interest as tenant in common in the royalty and service agreements with the United States Rubber Company.”

It was stipulated that the assets consisted “primarily” of the specific enumerated assets. [R. 19.] Certainly the trial court could and must have inferred that there were no other assets. Nor was it the duty of the taxpayer to negative the existence of all facts adverse to his claim.

Helvering v. Taylor, 293 U. S. 507.

If there were any other assets, they as well as the assets specifically enumerated would be capital assets within the meaning of Section 117(a)(1) of the Internal Revenue Code. Obviously the assets would not be excluded from the category of capital assets because at the time of the sale or exchange the taxpayer was not engaged in any business in which any of said assets were used and consequently they were not of the kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year; nor were they held by him for sale to customers in the course of his trade or business. Clearly, they were not used in James H.

Adamson's trade or business in the year 1940. As stated by the Tax Court in *Adamson v. Commissioner, supra*:

"From at least the time petitioner (James H. Adamson) commenced his suit in 1934 for an accounting, he merely held his interest in partnership assets awaiting the final division and distribution."

The fact that the taxpayer has shown no cost as to these specific assets is entirely immaterial. He treated the entire payment as a gain. As all the assets sold by James H. Adamson were capital assets, it would be useless to allocate the consideration received therefor so as to show which part of the consideration was received for which asset. The resultant gain and the tax thereon would always be the same.

The cases cited by the government on page 17 of their brief, to wit, *City Bank Farmers Trust Company v. U. S.*, 47 Fed. Supp. 98, and *City Bank Farmers Trust Company v. U. S.*, 47 Fed. Supp. 105, were cases decided by the Court of Claims and the Tax Court and Circuit Court of Appeal for the Third Circuit both refused to follow these cases.

For the first time in its brief, at page 15, appellant raises the point that the taxpayer has failed to prove that he actually overpaid his tax for 1940 by reason of an alleged failure to include in his reported income the sum of \$50,000.00 to be paid to his attorneys pursuant to the agreement of October 20th, 1939. In the first place, there is no evidence whatsoever whether or not the said sum of \$50,000.00 was ever paid to the taxpayer's attorneys during the year in question, nor was there any evidence as to whether or not the taxpayer did or did not include any

sum so paid in his reported income. Under the circumstances, the trial court was justified in concluding

1. That such payment was not made, or
2. That if made, was properly reported by the defendant.

In this connection, it must be called to the Court's attention that by stipulation of facts, the point in controversy was narrowed down to the nature of the \$32,500.00 received by the plaintiff under the agreement dated October 20th, 1939. [R. 12.] Under paragraph IV of the Stipulation of Facts it was provided that "the difference between the computations of the plaintiffs and the computations of the government result from the inclusion in said return of the sum of \$32,500.00 received . . . under an agreement dated October 20th, 1939. . . ." The government itself is thoroughly in accord with this construction of the stipulation, as appears from the following statement found on page 12 of its brief:

"In this case there is no controversy over the amount of income or profit received in the year 1940 under the contract of October 20th, 1939. . . . The principal question is whether the amount received is taxable as ordinary income or as gain from the sale of a capital asset."

Under the Stipulation of Facts there was no question as to whether or not the income was correctly reported and the trial court was not called upon to determine that issue. Such an issue, therefore, cannot now be raised by the government. The burden was not upon the taxpayer to negative the possibility of income beyond the amount already reported by him.

Helvering v. Taylor, 293 U. S. 507.

Although the matter of moneys paid to the attorneys is not in issue in this case, it is respectfully submitted that if such payments are includable in taxpayers' gross income, they are likewise includable under his deductions and as an expense paid during the taxable year for the conservation of property held for the production of income. [R. 51.] Section 23 (A) (2) of the Internal Revenue Code, which was added by the Revenue Act of 1942 and made effective retroactively for taxable years beginning after December 31st, 1938, by Section 121 (D).

The government argues on page 17 of its brief that to the extent that any part of the consideration received by the taxpayer under contract of October 20th, 1939, was for the sale of the judgment obtained against Percy Adamson, the same could not constitute the payment for a capital asset. Percy Adamson was the purchaser under the agreement of October 20, 1939. This argument would deserve no recognition were it not for the fact that it eloquently demonstrates that the provision contained in said contract for the transfer to the purchaser of specific assets was placed therein solely to divest the taxpayer of, and to vest the purchaser with, the absolute ownership of the taxpayer's partnership interest. In this connection appellees wish to point out that in the same contract not only did the taxpayer transfer the judgment to the purchaser, but he also agreed to execute a satisfaction of said judgment. [R. 57.]

The government contends that no part of the payments made or to be made to the taxpayer under the agreement of October 20, 1939, which represented payment for release by the taxpayer of his right to receive future income under the agreements with the United States Rubber

Company, can be treated as a payment for a capital asset. It is respectfully submitted that no part of such consideration was ever received by the taxpayer for the release of such royalty income.

The Tax Court stated in its recent decision in the matter of *Adamson v. Commissioner, supra*:

“Nor do we think it may be said that any part of the \$215,000.00 represents royalties and commissions that were to accrue in the future, the Rubber Company was bound at all events to pay petitioner the stipulated sum in consideration of the transfer of all petitioner’s interest in the partnership assets, regardless of whether future sales of ‘lastex’ products were made by or for the Rubber Company, or whether its contracts with Percy continued to exist.”

If the taxpayer did not sell his interest in the partnership, then he must have sold his interest in the royalty agreement. He certainly owned such interest until the contract of October 20, 1939, and, after he executed the said contract, he no longer had any such interest. Had the taxpayer *retained* his interest in the royalty agreement and merely sold the purchaser his right to the royalties, for a limited time, then there might have been some merit to the government’s contention. But a distinction is to be made between the sale of corpus and the sale of the income produced by such corpus.

J. V. Leydig, 15 B. T. A. 124;

Fox, 37 B. T. A. 271.

The government cites the case of *Hort v. Commissioner*, 313 U. S. 28, which we respectfully submit is not in point: This case decides that where a landlord cancels his lease

with the tenant as consideration for the payment of a lump sum, the payment constitutes income to the landlord.

The government also cites the case of *Helvering v. Smith* (C. C. A. 2), 90 F. (2d) 590, which likewise is not in point. In this case the taxpayer was a partner in a law firm and under the partnership agreement it was provided that a retiring partner should not be entitled to any part of any earnings for services performed after dissolution, but was to receive in full satisfaction only such partner's due pro rata share of such earnings actually collected and for services theretofore performed. The lease, furniture and law library were to belong to those who continued the business and the retiring partner got nothing for his share in the goodwill. The taxpayer retired from the firm and released his partners from all liability for a cash payment of \$125,000.00. The Court held that under this set of facts the transaction was not a sale, because he got nothing which was not his and gave up nothing which was." The Court further pointed out that except for the "purchase," all his collections would have been income because the remaining partners would merely have turned over to him his existing earnings already made. He had nothing to sell. He received only his portion of the moneys. This is an entirely different situation than the instant case where James Adamson sold an interest in assets, or in a partnership which had assets in which he had an interest.

The government also cites the case of *Doyle v. Commissioner*, 102 F. (2d) 86, which also involved a law

partnership, which upon the date of its dissolution had a claim for fees against the F. W. Woolworth Company. He sold no assets of any kind, but merely sold his interest in a fee which had already been earned.

On the other hand, in the *Estate of George R. Nutter*, *supra*, the surviving partners of a law partnership purchased the deceased partner's interest in the capital assets receivables, possibilities and goodwill of the firm, by paying to decedent's beneficiaries a stated percentage of future earnings of the succeeding partnership for a certain period of time. The Tax Court distinguished the case of *Helvering v. Smith* by pointing out that in the cited case the retiring partner had no interest in the future earnings to sell to his copartners. The Tax Court ruled in the *Nutter* case that the proceeds received by the decedent's heirs were in payment of corpus and therefore not income.

The government cites several cases as ruling that partnerships have not been treated as separate entities. None of these cases are in point; and none of them are of any aid in resolving the question presented in the instant case, except for the case of *Neuberger v. Commissioner*, 311 U. S. 83, where the Court made this observation:

"It is true, too, that in some cases the characteristics of partnerships as business units have been emphasized . . . while in others the characteristics of partnerships as associations of individuals have been stressed. . . . These cases, not decided under the Revenue Act of 1932 and turning, as they must, on their own peculiar facts are little aid in ascertaining the effect to be given to Section 23(2)(1)."

Conclusion.

It is respectfully submitted that the facts are clear and uncontradicted, that the taxpayer, James H. Adamson, sold either (1) an undivided one-half interest in an invention, in a patent, in a trademark and in two contracts with United States Rubber Company which he held as an investment and not in the course of any trade or business, or (2) an interest in a partnership which he held since 1925 to the date of sale October 20, 1939. In either case, it is respectfully submitted that the sale constituted the sale of a capital asset and the gain therefrom constituted a long term gain within the meaning of the Internal Revenue Code as it existed at the time and under the authorities cited herein.

It is respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

ZAGON, AARON AND SANDLER and
NATHAN SCHWARTZ,

By RAYMOND C. SANDLER,

Attorneys for Appellees.

No. 11397

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

E. A. GERETY, WILLIAM HARRAH, CHARLES
BROWN and HAROLD POOL,

Appellants,

vs.

ABBOT KINNEY COMPANY,

Appellee.

TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME I

(Pages 1 to 304, Inclusive)

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

OCT 23 1918

PAUL P. O'BRIEN,
CLERK

No. 11397

IN THE

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E. A. GERETY, WILLIAM HARRAH, CHARLES
BROWN and HAROLD POOL,

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In the District Court of the United States
Southern District of California
Central Division

In Bankruptcy No. 43551-O'C.

In the Matter of ABBOT KINNEY COMPANY, a
California Corporation, an Alleged Bankrupt.

CREDITORS' PETITION

To the Honorable, Judge of
the District Court of the United States, for the
Southern District of California:

The petition of Frank Williams, Moses C. Davis, and
Charles W. Cradick, respectfully shows:

1. That Abbot Kinney Company is a corporation organized under the laws of the State of California and that it is a business corporation and is not a municipal, railway, insurance or banking corporation or a building and loan association.

2. That the said Abbot Kinney Company has for the greater portion of the six months next preceding the date of the filing of this petition, had its principal place of business at the Venice Pier in the City of Los Angeles, County of Los Angeles, State of California, in said district.

3. That the said Abbot Kinney Company owes debts to the amount of \$1000.00 and over, and is insolvent.

4. That the petitioners are creditors of said Abbot Kinney Company, having proveable claims against it, which amount in the aggregate, in excess of the value of securities held by them, to \$500.00.

5. That the nature and amount of your petitioners' claim and the securities held by them, are as follows: That on the 1st day of April, 1931, Abbot Kinney Company issued its Trust Indenture, securing an authorized issue of \$350,000.00 First Mortgage 7% Sinking Fund Gold Bonds, which Gold Bonds, under the terms of said Trust Indenture, were due April 1, 1944. That at the present time, there is still outstanding, \$269,000.00 of said bonds. That interest on said bonds has not been paid since April 1, 1932, other than the sum of \$10,000.00 per [2] \$1000.00 bond. That there is presently due in interest on said outstanding bonds, a sum in excess of \$225,000.00. That your petitioners own together, in excess of \$75,000.00 of the face amount of said bonds. That said bonds have been long in default; that in addition to the bonds outstanding, as aforesaid, the Abbot Kinney Company owes taxes which are liens against the property securing the above described Gold Bonds in a sum in excess of \$76,000.00. That the total amount due on said bonds for principal and interest is in excess of \$500,000.00. That the total reasonable market value of all of the assets of the Abbot Kinney Company, including all of the property covered by the above mentioned Trust Indenture, does not equal \$400,000.00. That your peti-

tioners do not waive the security which they hold under the Trust Indenture above referred to; that the assets securing said bonds, have a value of at least \$100,000.00 less than the total amount presently due on said bonds.

6. That within four months preceding the filing of this petition, viz.: on the 23rd day of June, 1944, the said Abbot Kinney Company, while insolvent, committed an act of bankruptcy in that it did pay to one Charles J. Brown and others, the sum of \$7500.00 on a debt which had been owing to said Charles J. Brown and others and their assignor, for more than ten years, which payment was made for the purpose and with the intent of preferring said Charles J. Brown and others, over the other creditors of said Abbot Kinney Company.

Wherefore, your petitioners pray that service of this petition, with the subpoena, may be made upon Abbot Kinney Company, as provided by said bankruptcy law of 1898 as amended, and that it may be adjudged bankrupt within the purview of such law.

FRANK WILLIAMS

MOSES C. DAVIS

CHARLES W. CRADICK

Petitioners

NICHOLAS & DAVIS

By M. Philip Davis

Attorneys for Petitioners [3]

[Verified.]

[Endorsed]: Filed Oct. 21, 1944. [4]

[Title of District Court and Cause.]

CREDITORS' FIRST AMENDED INVOLUNTARY
PETITION

To the Honorable J. F. T. O'Connor, Judge of the District Court of the United States, for the Southern District of California:

The first amended involuntary petition of Frank Williams, Moses C. Davis and Charles W. Cradick, respectively shows:

1. That Abbot Kinney Company is a corporation organized and existing under the laws of the State of California and that it is a business corporation and is not a municipal, railway, insurance or banking corporation, or a building and loan association.

2. That the said Abbot Kinney Company has for more than 25 years next preceding the date of the filing of the original involuntary petition in the above entitled matter, had its principal place of business at the Venice Pier in the City of Los Angeles, County of Los Angeles, State of California, in said district.

3. That the said Abbot Kinney Company owes debts in excess of \$100,000.00 and is insolvent and is not a wage earner or farmer.

4. That each of the petitioners are creditors of said Abbot Kinney Company, each having a provable general unsecured claim against Abbot Kinney Company fixed as

to liability and liquidated in amount, which, in the aggregate, amounts to more than \$500.00 over and above the value of securities held by each of them.

5. That the nature and amount of your petitioners' claim and the securities held by them, are as follows: That on the 1st day of April, 1931, Abbot Kinney Company issued its Trust Indenture, securing an authorized issue of \$350,000.00 First Mortgage 7% Sinking Fund Gold Bonds, which Gold Bonds, under the terms of said Trust Indenture, were due April 1, 1944. That there [5] is presently outstanding and unpaid, \$269,000.00 principal amount of said bonds. That there is presently due in interest on said outstanding bonds, a sum in excess of \$225,000.00. That the Abbot Kinney Company also owes taxes which are liens against the property securing said unpaid bonds, in a sum in excess of \$75,000.00. That the total reasonable market value of all of the assets of Abbot Kinney Company securing the payment of said outstanding bonds, is less than \$400,000.00. That the assets of Abbot Kinney Company securing said unpaid bonds, have a value of at least \$100,000.00 less than the total amount of principal and interest presently due on said bonds. That your petitioner Frank Williams owns more than \$75,000.00 of the face amount of said unpaid bonds and your petitioners, Moses C. Davis and Charles W. Cradick, each own not less than \$1,000.00 of the face amount of said unpaid bonds. That your petitioners do not waive the security for said bonds.

6. That within four months preceding the filing of the original involuntary petition in the above entitled matter, viz., on the 23rd day of June, 1944, the said Abbot Kinney Company, while insolvent, committed an act of bankruptcy in that it did pay out of its assets, to Charles Brown, Ed Gerety and so plaintiff is informed and believes and upon that ground alleges, to William Harrah and John Harrah, the sum of \$7500.00 on an antecedent debt due them by Abbot Kinney Company, which payment was made for the purpose and with the intent of preferring said Charles Brown, Ed Gerety, William Harrah and John Harrah, over the other creditors of said Abbot Kinney Company.

Wherefore, your petitioners pray that service of this petition, with the subpoena, may be made upon Abbot Kinney Company, as provided by said bankruptcy law of 1898 as amended, and that it may be adjudged bankrupt within the purview of such law.

FRANK WILLIAMS

MOSES C. DAVIS

CHARLES W. CRADICK

Petitioners

NICHOLAS & DAVIS

By M. Philip Davis

Attorneys for Petitioners [6]

[Verified.]

[Endorsed]: Filed Mar. 1, 1945. [7]

[Title of District Court and Cause.]

ANSWER OF ALLEGED BANKRUPT.

To the Honorable J. F. T. O'Connor, Judge of District Court of the United States, for the Southern District of California:

A petition having been filed in the above entitled court on the 21st day of October, 1944, praying that your respondent, the alleged bankrupt above named, be adjudged a bankrupt, and, having thereafter filed herein, on the 28th day of February, 1945, its first amended petition, your respondent now appears and answers the said amended petition as follows:

1. Respondent admits the allegations contained in paragraphs 1, 2 and 6 of said first amended involuntary petition.

2. Respondent denies each and every allegation contained in paragraph 3 of said first amended involuntary petition, except that it admits it is not a wage earner or a farmer.

3. Respondent denies each and every allegation contained in paragraph 4 of the said first amended involuntary petition, except that it admits that each of the petitioning creditors is a creditor of the respondent.

4. Respondent denies each and every allegation contained in paragraph 5 of said amended involuntary petition, except that it admits that on the 1st day of April,

1931, the alleged bankrupt issued its trust indenture securing an authorized issue of \$350,000 First Mortgage 7% Sinking Fund Gold Bonds, which bonds, under the terms of said trust indenture, were due April 1, 1944, and there is pre- [8]sently outstanding and unpaid \$269,000, principal amount of said bonds. Respondent further admits that there is presently due in interest on said outstanding bonds, a sum in excess of \$225,000. Respondent further admits that the alleged bankrupt also owes taxes, which are liens against the property securing the said bonds, in a sum in excess of \$75,000.

5. Wherefore, your respondent prays that a hearing may be had on the said amended petition and this answer, and that the issues presented thereby may be determined by a jury, and for general relief.

ABBOT KINNEY COMPANY

By W. Thos. Davis

Its President

Respondent

GRAINGER & HUNT

By Reuben G. Hunt

Attorneys for Respondent

[Verified.]

[Endorsed]: Filed Mar. 13, 1945. [9]

[Title of District Court and Cause.]

Appearances:

Grainger & Hunt and Nicholas & Davis, 634 South Spring St., Los Angeles 14, Calif., Attorneys for Alleged Bankrupt.

Cobb & Utley, 639 South Spring St., Los Angeles 14, Calif., Attorneys for Charles Brown.

D. M. Kitzmiller, 610 Rowan Bldg., Los Angeles 13, Calif., Attorney for E. A. Gerety.

Leslie L. Heap, 829 Citizens National Bank Bldg., Los Angeles 13, Calif., Attorney for William Harrah.

REFEREE'S CERTIFICATE ON PETITION FOR
REVIEW OF ORDER IN RE DISPOSITION
OF MONEY HELD BY CLERK OF COURT

To the Honorable J. F. T. O'Connor, Judge of the above
entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy
of this Court, before whom the above entitled matter is
pending, do hereby certify to the following:

Charles Brown, E. A. Gerety and William Harrah have
filed their petition for the review of an order made by
your Referee in this matter on August 23, 1945, in which
he directed the disposition of the sum of \$30,000.00 now
held by the Clerk of this Court, pursuant to a stipulation
entered into by the parties in [10] interest and approved
by the Court.

The Proceedings

An involuntary petition in bankruptcy was filed in this matter against the alleged bankrupt on October 21, 1944. It is still pending and undetermined. Shortly after the filing of the said involuntary petition and on or about November 8, 1944, two of the three members of the "Executive Committee" of the alleged bankrupt paid to Charles Brown, one of the petitioners on review, \$30,000.00 of the alleged bankrupt's money on a certain "sprinkler" contract upon which the alleged bankrupt was then obligated.

Brown had secured an assignment of the seller's interest in the said contract in June of 1944 for \$15,000.00 and shortly thereafter the aforesaid same two members of the "Executive Committee" had paid him \$7500.00 of the alleged bankrupt's money thereon. The said contract was made in 1931 and, when Brown secured his aforesaid assignment, nothing had been paid on the contract since 1932 although the balance owing thereon appeared to be \$137,000.00.

A controversy arose over the payment of the aforesaid sum of \$30,000.00 and by stipulation of the parties in interest, approved by the Court, the money was placed in the custody of the Clerk of this Court as a Court of Bankruptcy.

This proceeding was first referred to Referee Hugh L. Dickson, one of the Referees in Bankruptcy of this Court. On July 7, 1945, upon the petition of the alleged bankrupt, he issued an Order to Show Cause, requiring the petitioners on review and one, John Harrah, one of the two aforesaid members of the "Executive Committee," to

show cause why an order should not be entered, (1) Adjudging the alleged bankrupt to be the owner of the aforesaid "sprinkler" contract and the sprinkling system covered thereby and decreeing that any interest therein, on the part of any of the respondents in the said order to show cause, was held by them [11] in trust for the alleged bankrupt; and (2) Directing the Clerk of the Court to pay to the alleged bankrupt the sum of \$30,000.00 held by him, as aforesaid, and requiring Brown to return to the alleged bankrupt the sum of \$7500.00 which had been paid to him, as aforesaid.

The said John Harrah, one of the respondents named in the said Order to Show Cause, made an oral disclaimer of any interest in the aforesaid contract and in the said sum of \$30,000.00.

The petitioners on review filed written answers to the said Order to Show Cause and the petition upon which it was issued.

Charles Brown and E. A. Gerety, two of the petitioners on review, filed written objections to the jurisdiction of this Court to hear and determine the issues raised by the said Order to Show Cause and the petition upon which it was issued. William Harrah, the remaining petitioner on review orally adopted the said objections to jurisdiction.

The said Order to Show Cause and the said objections to the jurisdiction of this Court came on for hearing before Referee Dickson on July 23, 1945. The said objections to jurisdiction were overruled by him and thereupon it was suggested by one of counsel in the case that Referee Dickson was disqualified by reason of prejudice to proceed with the matter. The said Referee

promptly stated that he was entirely free of any feeling of bias or prejudice in the matter, but that, since the question had been raised, he would, if there was no objection, request your Referee to proceed with the matter. No objection being made, the matter was taken over by your Referee and, in due course, appropriate orders of reference were made.

Your Referee began the hearing on the aforesaid Order to Show Cause, the petition upon which it was issued and the answers thereto, on July 24, 1945, and completed the same on July 27, 1945. At the commencement of the hearing the petitioners on review [12] renewed their aforesaid objections to the jurisdiction of this Court which Referee Dickson had overruled, as aforesaid. Your Referee concurred in Referee Dickson's ruling and again overruled the said objections.

At the completion of the hearing on July 27, 1945, your Referee announced his decision from the bench, holding (1) that Brown and anyone associated with him could not collect anything more from the alleged bankrupt on the "sprinkler" contract here involved than Brown had paid for the assignment of the seller's interest therein, to-wit: the sum of \$15,000.00; (2) that, since Brown had been paid \$7500.00 in June of 1944, the \$30,000.00 payment, which was made after the filing of the involuntary petition herein, was valid only to the extent of \$7500.00 and invalid as to the remaining \$22,500.00; (3) that, accordingly, the Clerk of this Court should be directed to pay Brown \$7500.00 and the alleged bankrupt \$22,500.00 of the \$30,000.00 deposited with him; and (4) that whatever interest Gerety and William Harrah might have in the \$7500.00 to be paid to Brown should be asserted

against Brown himself, for the reason that at the time the \$30,000.00 was paid Brown was the only one entitled to collect anything from the alleged bankrupt on the "sprinkler" contract. On August 23, 1945, your Referee signed and filed his formal Findings of Fact and Conclusions of Law and his Order in the matter. It is from this Order that this review is taken.

The Questions Presented

The questions presented by this view are set forth in the assignments of error which appear on pages 2 to 14, both inclusive, of the petition for review. However, aside from the rulings made by your Referee on the admission of evidence, the essential questions here presented may be summarized as follows:

(a) Does this Court have jurisdiction to [13] determine the validity and propriety of the payment of \$30,000.00 here involved?

(b) If this Court does have jurisdiction in the premises, was your Referee correct in holding that Brown, or anyone associated with him, could not collect anything more on the "sprinkler" contract than Brown had paid for the assignment of the seller's interest therein?

The Evidence

The evidence on the questions here presented is contained in the transcript of the proceedings and in the exhibits, all of which are going up with this certificate.

Findings of Fact, Conclusions of Law and Order

True copies of your Referee's Findings of Fact and Conclusions of Law and Order are attached to the Petition for Review which is going up with this certificate.

Papers Submitted

For the information of the Court the following papers are transmitted herewith:

1. Petition for Order to Show Cause, filed July 7, 1945.
2. Order to Show Cause, filed July 7, 1945.
3. Separate answers of Charles Brown, E. A. Gerety and William Harrah, filed July 23, 1945.
4. Separate objections to jurisdiction, filed by Charles Brown and E. A. Gerety July 23, 1945.
5. Objections to proposed Findings of Fact and Conclusions of Law, filed August 23, 1945.
6. Reporter's transcript of proceedings filed August 31, 1945. (Two volumes.)
7. Petition for Review filed August 31, 1945.
8. The following exhibits:

Bankrupt's exhibits

1. Agreement dated June 2, 1931, with supplemental agreements attached. [14]
2. Agreement (form of an assignment) dated March 4, 1944.
3. Cancelled check made payable to Charles J. Brown dated November 8, 1944.
4. Letter dated November 6, 1944, signed by Chas. J. Brown.

5. Cancelled check made payable to Charles J. Brown dated November 8, 1944.
6. Letter dated November 30, 1944, signed William F. Harrah.
7. Letter dated June 6, 1944, signed by F. R. Cruikshank & Co. by H. V. Dorr, Secy's-Treas.
8. Cancelled check dated Nov. 25, 1944, made payable to Chas. J. Brown.

Brown's exhibits

1. Bank Statement—Security-First National Bank.
2. Letter dated July 25, 1945, from Security-First National Bank to Charles J. Brown.
3. Cancelled Counter-Receipt dated 3-2-44.
4. Copy of "Receipt" dated June 13, 1944, signed by Charles J. Brown.

Gerety's exhibit

1. Copy of agreement dated December 23, 1937.

The following papers are also transmitted, pursuant to the request of the petitioners on review:

1. Petition in Intervention in Opposition to Amended Involuntary Petition, filed July 19, 1945.
2. Notice of Motion on Petition to Intervene, filed July 19, 1945.
3. Amended Answer of Alleged Bankrupt, filed July 20, 1945.

Note: The Amended Involuntary Petition and the Answer thereto are in the Clerk's file in this matter.

Respectfully submitted this 12th day of September, 1945.

BENNO M. BRINK

Referee in Bankruptcy

[Endorsed]: Filed Sep. 12, 1945. [15]

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE

The petition of Abbott-Kinney Company, a corporation, alleged bankrupt above named, respectfully alleges:

1. That on the 21st day of October, 1944, a petition in involuntary bankruptcy was filed against Abbott-Kinney Company, a corporation, and thereafter on the 28th day of February, 1945, a creditors first amended involuntary petition was filed in said proceeding. An answer has been filed to said first amended involuntary petition, and the matter is now pending before the above entitled Court.

2. That no receiver has been appointed in this proceeding.

3. That on the 2d day of June, 1931, F. R. Cruickshank & Co. entered into a contract with said Abbott-Kinney Company, a corporation, to install at the Pier and on the properties of the Abbott-Kinney Company, a sprinkling system, for a contract price of \$400,000.00. That pursuant to said contract, said sprinkler system [16] was installed. That under said contract, said F. R. Cruickshank & Co. purported to retain title to the sprinkling system until the full payment of the purchase price had been made. That prior to and at the time of the filing of the involuntary petition in bankruptcy herein, and ever since the time of the filing thereof, the alleged bankrupt has been and still is in possession of the said sprinkling system.

4. That Charles Brown, E. A. Gerety, William Harrah, and as petitioner is informed and believes, and there-

fore alleges, John Harrah, claim to hold and own the seller's interest in said sprinkling contract and said sprinkling system, but that said claim of said parties, and each of them, is without foundation, and that any holding of title by said parties, or any of them, is in fact in trust for the alleged bankrupt, and the alleged bankrupt is the real owner of said sprinkling system.

5. That John Harrah has been a director of said Abbott-Kinney Co. ever since the 23d day of December, 1937.

6. That E. A. Gerety was an employee of Abbott-Kinney Co. for many years, and from 1937 until December 13, 1944, was its general manager.

7. That Charles Brown was for many years an employee of said company, and during the year prior to the filing of the petition in bankruptcy was a lessee of said company, and was in and out of the office of said company almost daily and was in constant touch with E. A. Gerety, John Harrah and Carleton Kinney. That said Charles Brown also for many years has been and now is a business associate of said John Harrah and William Harrah.

8. That on the 6th day of April, 1938, by action of the Board of Directors of said corporation, an Executive Committee was created to be composed of three members, with authority given to said Committee to carry on the business of the company during the intervals between the meetings of the Board of Directors. That from the 16th day of November, 1938, until the 13th day of No-

vember, 1944, the mem- [17] bers of said Executive Committee were John Harrah, Carleton Kinney and Alfred Newton.

9. That at all times in all matters relating to said corporation, wherein William Harrah was interested, said John Harrah was agent for him, and acted for him as such agent.

10. That the asserted claim of said E. A. Gerety, Charles Brown, William Harrah, and John Harrah, as aforesaid, to the sprinkling system and the said F. R. Cruickshank contract arose in the following manner: During January, 1943, said F. R. Cruickshank Co. offered to accept the sum of \$10,000.00 in full settlement upon its contract, upon which contract, the said Cruickshank Co. then claimed there was a balance owing of \$137,000.00. That a meeting of the Executive Committee was held to consider the offer, there being present Alfred Newton and John Harrah, Carleton Kinney being absent. Said John Harrah voted not to accept the offer, saying that the contract was worthless. Alfred Newton voted to accept the offer, but the motion to accept the offer was lost by virtue of a majority of the committee failing to vote for the acceptance. In May, 1944, said Cruickshank Co. again offered to accept \$10,000.00 in full settlement of its said contract, and its rights thereunder, upon which contract there was then the sum of \$137,000.00 claimed by Cruickshank Co. to be owing. Said John Harrah and Carleton Kinney, whom your petitioners be-

lieve and therefore allege was at said time under the dominance of said John Harrah, refused the said offer saying that the contract was worthless.

Said corporation at the time each said offer was made by the said Cruickshank Co. to cancel or dispose of its interest in said sprinkling contract for \$10,000.00 was financially able to pay the sums required by said Cruickshank Co. for the cancellation or transfer of the said contract, and would have done so, except for the said machinations herein set forth of said John Harrah, and the said E. A. Gerety, William Harrah and Charles Brown. [18]

10. On or about the Monday following the said refusal to accept said offer, Charles Brown purported to purchase said F. R. Cruickshank Co.'s sprinkling contract for the sum of \$15,000.00. On November 25, 1944, petitioner received a letter from William Harrah in which he stated he had purchased a one-third interest in the said sprinkling contract. Immediately after the said contract was assigned to said Charles Brown by the Cruickshank Co., to-wit, on the 7th day of June, 1944, at a meeting of the executive committee at which said John Harrah and Carleton Kinney were present, Alfred Newton being absent, it was ordered that \$7500.00 be paid by the corporation on the said sprinkling contract to said Charles Brown, and thereupon the said sum was so paid. That thereafter on the 7th day of November, 1944, and after the filing of the petition in bankruptcy herein at a meeting of the said executive committee, at which meeting

Carleton Kinney and John Harrah were present, and Alfred Newton being absent, it was directed that the sum of \$30,000.00 be paid to Charles Brown on said sprinkler contract, and thereupon such sum of \$30,000.00 was so paid to him. That said sum of \$30,000.00 so paid was in the possession of the alleged bankrupt at the time of the filing of said petition, and thereafter until it was paid to said Charles Brown, leaving purportedly to be paid under said contract a sum of \$80,000.00.

11. Petitioner is further informed and believes and therefore alleges that in purportedly purchasing said contract and the rights of the seller thereunder, said Charles Brown for convenience and as a "dummy" took in his own name the purported interest of said John Harrah, William Harrah, and E. A. Gerety, with the secret understanding that he would hold such interest for them; and petitioner is likewise informed and believes and therefore alleges that taking of the alleged title in the name of said Charles Brown was likewise for the purpose of concealing the interest of the said other parties in and to said purported purchase.

12. That petitioner is informed and believes and therefore [19] fore alleges that said Carleton Kinney at all of said times was under the dominance of said John Harrah, and acted as said John Harrah directed.

13. That each and all of the said parties had full knowledge of all of the matters and things herein alleged.

14. That all of said acts of said Charles Brown, E. A. Gerety, William Harrah and John Harrah as set forth in the preceding paragraphs in connection with the acquisition of said sprinkling system contract and the payment thereon were in violation of the fiduciary obligations and duties owing by said individuals to said corporation, and were done with full knowledge by each of said parties of his own fiduciary obligations and duties to the said corporation, and the fiduciary duties and obligations of each of the other parties to the said corporation. That all of said acts were done for the purpose of and with the intent of defrauding and cheating the said corporation and its creditors and estate, and for the benefit of said individuals, and said parties did in the manner hereinbefore set forth cheat and defraud the said Abbott Kinney Co.

15. That after said sum of \$30,000.00 was paid as aforesaid to said Charles Brown, in accordance with the stipulation of the parties, a copy of which is attached hereto, marked "Exhibit A" and made a part hereof, the said sum of \$30,000.00 was deposited with the Clerk of this Court.

16. That petitioner offers to do equity as the Court may direct in the premises.

17. That said sums of \$7500.00 and \$30,000.00 wrongfully paid to said Charles Brown in the manner hereinbefore set forth should be ordered paid over to the alleged bankrupt and its estate.

Wherefore, petitioner prays that an order to show cause issue herein, directing Charles Brown, E. A. Gerety, William Harrah, and John Harrah, and each of them, to be and appear before this Court at a time and place therein mentioned, then and there [20] to show cause why an order should not be made, adjudging and decreeing:

1. That the alleged bankrupt is the owner of such sprinkling system and the said F. R. Cruickshank contract, free from any claim of said parties or any of them;

2. That any title held by said parties, or any of them, be decreed to be in trust for the alleged bankrupt, and that said parties be ordered to execute such instruments as will show title to be in the alleged bankrupt;

3. That the sum of \$30,000.00 paid to Charles Brown as in this petition alleged, and thereafter deposited with the Clerk of this Court be delivered to the alleged bankrupt as its property, and that the sum of \$7500.00 paid by said alleged bankrupt to said Charles Brown as in this petition alleged be returned to the alleged bankrupt and petitioner further prays that upon the hearing of said order to show cause that such order be made and entered herein.

Dated this 5th day of July, 1945.

ABBOTT-KINNEY COMPANY, a corporation
By W. Thos. Davis

GRAINGER AND HUNT

By Kyle Z. Grainger

Attorneys for Alleged Bankrupt [21]

EXHIBIT A

In the District Court of the United States
Southern District of California
Central Division

No. 43,551 O'C. In Bankruptcy

In the Matter of ABBOTT KINNEY COMPANY, a
corporation, Alleged Bankrupt.

AMENDED STIPULATION AND ORDER
APPROVING SAME

The petitioning creditors in the above entitled involuntary proceeding in bankruptcy, the alleged bankrupt, and Charles J. Brown, having signed and filed herein a stipulation, approved by the Court, concerning the disposition of \$30,000.00 now held by Charles J. Brown, and it appearing that the terms and conditions of the said stipulation should be clarified in order to make plainer the intentions of the parties,

It is hereby agreed that the said stipulation shall be amended to read as follows:

Whereas, an involuntary petition in bankruptcy has been filed in the above entitled proceeding in the above-entitled court against the above named alleged bankrupt and is now pending; and

Whereas, the petitioning creditors therein have heretofore filed therein a petition for an order requiring the said Charles J. Brown to pay over to the estate of the alleged bankrupt the said sum of \$30,000.00, which the alleged bankrupt contends was unlawfully paid to the said Charles J. Brown out of such estate subsequent to the filing of

the said involuntary petition, and an order to show cause thereon has been issued against the said Charles J. Brown, and said petition and order to show cause are now pending before the above-entitled; and

Whereas, the said Charles J. Brown has filed herein a petition for the appointment of a receiver in bankruptcy prior to [22] adjudication, and such petition is now pending before the above-entitled court; and

Whereas, the above-entitled proceeding has been referred by the court generally for administration by its order to Hugh L. Dickson, a referee in Bankruptcy of said court, pursuant to the provisions of Section 22 of the National Bankruptcy Act of 1898, as amended; and

Whereas, a dispute has arisen between the alleged bankrupt and Charles J. Brown with respect to the cancellation by said alleged bankrupt of certain leases held by the said Charles J. Brown,

Now, Therefore, It Is Hereby Stipulated and Agreed as Follows:

1. The said petition of Charles J. Brown for the appointment of a receiver in bankruptcy may be denied without prejudice, and the bond heretofore posted by the said Charles J. Brown, pursuant to the provisions of Section 3-(e) of the said Bankruptcy act, shall be exonerated.

2. The said petition for an order requiring the said Charles J. Brown to pay back the said sum of \$30,000.00,

shall be denied, and the said order to show cause issued thereon, shall be discharged, both without prejudice.

3. The said Charles J. Brown shall pay over to the Clerk of the above entitled Court, as a court of bankruptcy, the said sum of \$30,000.00, to be impounded and held by him, pursuant to the provisions of Sections 851 and 852 of the Judicial Code of the United States, under the following terms and conditions:

(a) The pending motion by the alleged bankrupt to dismiss the said involuntary petition shall be reset for hearing upon the court calendar at the earliest possible date in February, 1945, but not later than February 16, 1945, and thereafter proceedings to determine the sufficiency of the said involuntary petition, or amendments thereto, shall be prosecuted with due diligence, and all other [23] matters pertaining to the determination of the solvency or insolvency of the alleged bankrupt, and the commission by it of an act, or acts, of bankruptcy, shall likewise be prosecuted with due diligence. Nothing herein contained shall be deemed to prevent the alleged bankrupt from commencing herein a proceeding under Chapter X or XI of the Bankruptcy Act.

(b) Each of the parties hereto shall be given notice in writing of the time and place of all hearings in the above-entitled proceeding at least five days prior to any such hearing.

(c) In the event the above-entitled involuntary proceeding is finally dismissed, the said sum of \$30,000.00 shall

be returned by the said Clerk to the said Charles J. Brown without deduction of any amount whatever, unless, prior to the ten days after such final order or dismissal, the alleged bankrupt shall serve upon the parties hereto, and file herein, an application that the said sum of \$30,000.00 or a part thereof, shall be paid over to it, in which event the said sum shall be retained by the said Clerk and disbursed by him to the person or persons whom the above-entitled court shall finally determine is or are entitled thereto after due hearing upon notice to the parties hereto, or, if the said court shall decide that it does not have jurisdiction to determine who is entitled thereto, then, and in that event, the said sum shall be returned by the said Clerk to the said Charles J. Brown without any deduction therefrom whatsoever, without prejudice.

(d) In the event a final order of adjudication is made in the above-entitled proceeding, or a final order is made approving the commencement of a Chapter X or XI proceeding under the Bankruptcy Act, the said sum of \$30,000.00 shall be paid over by the said Clerk to the receiver in Bankruptcy, the trustee in bankruptcy, or the debtor-in-possession herein, as the case may be, unless prior to ten days after such final order of adjudication, the said Charles J. Brown shall serve upon the parties hereto, and file herein, an application that the said sum of \$30,000.00, or a part thereof, shall [24] be paid over to him, in which event the said sum shall be retained by

the said Clerk and disbursed by him to the person or persons whom the above-entitled court shall finally determine is or are entitled thereto after due hearing upon notice to the parties hereto.

(e) Pending the determination by the above-entitled trial court of all the matters above set forth, the alleged bankrupt shall not take any further action whatsoever in the matter of the cancellation of any lease, or purported lease between the alleged bankrupt, as lessor, and Charles J. Brown, as lessee, by reason of any cause now existing, as set forth in notices of cancellation dated December 21, 1944.

Dated: This 8 day of January, 1945.

H. B. POOL & HIRAM E. CASEY

By H. B. POOL

Attorneys for Charles J. Brown

GRAINGER AND HUNT

By REUBEN G. HUNT

Attorneys for Alleged Bankrupt

NICHOLAS & DAVIS

By WM. HOWARD NICHOLAS

Attorneys for Petitioning Creditors [25]

[Verified.]

[Endorsed]: Filed Jul. 7, 1945, at 30 min. past 11 o'clock A. M. Hugh L. Dickson, Referee; Clerk JB.

[Endorsed]: Filed Sep. 12, 1945. [26]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Abbott-Kinney Company, a corporation, the alleged bankrupt above named, having filed herein a duly verified petition praying that the hereinafter order to show cause issue, now, therefore, no adverse interests appearing thereat, on motion of Grainger and Hunt, counsel for said alleged bankrupt,

It Is Ordered that Charles Brown, E. A. Gerety, William Harrah, and John Harrah, and each of them, be and they are hereby directed to appear before Hugh L. Dickson, Referee in Bankruptcy, at his Court Room at 339 Federal Building, Los Angeles, California, on the 16th day of July, 1945, at the hour of 10:00 o'clock in the forenoon of said day, then and there to show cause, if any there be, why an order should not be made and entered herein, adjudging and decreeing:

1. That the alleged bankrupt is the owner of that certain sprinkling system installed by F. R. Cruickshank & Co., and is likewise the owner of the F. R. Cruickshank & Co. contract relating thereto, free [27] from any claim of said parties or any of them;

2. That any title held by said parties, or any of them, be decreed to be in trust for the alleged bankrupt, and that said parties be ordered to execute such instruments as will show title to be in the alleged bankrupt;

3. That the sum of \$30,000.00 paid to Charles Brown by the alleged bankrupt, and thereafter deposited with the Clerk of this Court, be delivered to the alleged bank-

rupt as its property, and that the sum of \$7500.00 paid by said alleged bankrupt to said Charles Brown in connection with the F. R. Cruickshank & Co. contract be returned to the alleged bankrupt.

It Is Further Ordered that service of the within order to show cause may be made upon the respondents in the following manner, to-wit:

By any citizen of the United States, over the age of 21 years, and not a party to the within proceeding, by serving a copy of the within order and a copy of the petition upon which it is based upon Charles Brown, E. A. Gerety, and John Harrah at least five days prior to the date of hearing on said order to show cause.

With respect to William Harrah, service may be made upon him in the same manner, or service may be made upon him, by placing a true copy of said order and the petition upon which it is based in an envelope addressed to said William Harrah, at Reno, Nevada, and by then sealing said envelope and depositing the same, registered mail, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, at least six days prior to the date of hearing and if such service is made by mail, A. O. Carver is hereby designated to make such service.

Dated this 7th day of July, 1945.

HUGH L. DICKSON

Referee in Bankruptcy

[Endorsed]: Filed Jul. 7, 1945, at 30 min. past 11 o'clock A. M. Hugh L. Dickson, Referee; Clerk JB.

[Endorsed]: Filed Sep. 12, 1945. [28]

[Title of District Court and Cause.]

ANSWER OF CHARLES BROWN TO PETITION
AND ORDER TO SHOW CAUSE DATED
JULY 7, 1945

Now comes respondent Charles Brown, and without waiving his objections to the jurisdiction of the above entitled court on file herein, admits and denies in respect to the petition for an order to show cause on file, as follows:

I.

Admits all of the allegations contained in paragraph 1, except that said involuntary petitions referred to constitute valid petitions in bankruptcy, and alleges the true facts to be that said amended involuntary petition does not state facts sufficient to constitute an act of bankruptcy or to invoke the jurisdiction of this court.

II.

Admits the allegations contained in paragraph 2.

III.

For answer to paragraph 3, admits the allegations therein contained.

IV.

For answer to paragraph 4, denies each and every allegation [29] contained in paragraph 4, except that Charles Brown, E. A. Gerety and William Harrah own said conditional sales contract referred to in said petition, and the legal title to all personal property described therein.

V.

Admits the allegations contained in paragraph 5.

VI.

Admits the allegations contained in paragraph 6.

VII.

For answer to paragraph 7, admits the allegations contained therein except that Charles Brown is a business associate of said John Harrah and William Harrah.

VIII.

For answer to paragraph 8, admits the allegations contained therein.

IX.

For answer to paragraph 9, admits the allegations contained therein.

X.

For answer to paragraph 10, this answering respondent denies each and every allegation contained therein, and alleges the true facts to be that Charles Brown and E. A. Gerety, after negotiating with the attorney for the F. R. Cruickshank Co., purchased said conditional sales contract for the sum of \$15,000.00. That prior to the purchase by them negotiations had been had at different times between the attorney for the Cruickshank company and officers and directors of the Abbot Kinney Company to compromise the amount due under said conditional sales contract, but that said alleged bankrupt did not have the funds with which to pay the demand of the Cruickshank company or neglected to make any settlement thereof.

For answer to paragraph 10 on page 4, this answering respondent denies each and every allegation contained therein, except that Charles Brown and E. A. Gerety purchased for \$15,000.00 said [30] conditional sales contract, and that on June 7, 1944 and prior thereto demanded of the alleged bankrupt that a payment be made upon said contract and that an arrangement be worked out to pay the balance due thereon in installments, and that said alleged bankrupt agreed, in consideration of an extension of time, to pay the sum of \$7,500.00 and thereafter on November 7, 1944 to pay an additional \$30,000.00. That thereafter said sums were paid as agreed upon and that the payment on November 7, 1944 was after the filing of the purported involuntary petition in bankruptcy. That the unpaid balance upon said contract is the sum of \$80,000.00.

XI.

For answer to paragraph 11, this answering respondent denies each and every allegation therein contained.

XII.

For answer to paragraph 12, this answering respondent denies each and every allegation therein contained.

XIII.

For answer to paragraph 13, this answering respondent denies each and every allegation therein contained.

XIV.

For answer to paragraph 14, this answering respondent denies each and every allegation therein contained.

XV.

For answer to paragraph 15, this answering respondent admits the allegations therein contained.

XVI.

For answer to paragraph 16, this answering respondent denies each and every allegation therein contained.

XVII.

For answer to paragraph 17, this answering respondent denies each and every allegation therein contained. [31]

Wherefore this answering respondent prays that this court dismiss the above entitled proceeding and enter such an order in that connection as is just and proper in the premises.

CHARLES BROWN

Respondent

COBB & UTLEY

By Francis B. Cobb

Attorneys for Respondent [32]

[Verified. [33]

[Endorsed]: Filed Jul. 23, 1945 at min. past 10 o'clock A. M. Hugh L. Dickson, Referee; Clerk JB.

[Endorsed]: Filed Sep. 12, 1945. [34]

[Title of District Court and Cause.]

ANSWER OF E. A. GERETY TO PETITION AND
ORDER TO SHOW CAUSE DATED JULY 7,
1945

Now comes respondent E. A. Gerety, and without waiving his objections to the jurisdiction of the above-entitled court on file herein, admits and denies, in respect to the petition for an order to show cause on file, as follows:

I.

Admits all the allegations contained in paragraph 1, except that said involuntary petitions referred to constitute valid petitions in bankruptcy, and alleges the true facts to be that said amended involuntary petition does not state facts sufficient to constitute an act of bankruptcy or to invoke the jurisdiction of this court.

II.

Admits the allegations contained in paragraph 2.

III.

For answer to paragraph 3, admits the allegations therein contained.

IV.

For answer to paragraph 4, denies each and every [35] allegation contained in paragraph 4, except that Charles Brown, E. A. Gerety, and William Harrah own said conditional sales contract referred to in said petition and the legal title to all personal property described therein.

V.

Admits the allegations contained in paragraph 5.

VI.

Admits the allegations contained in paragraph 6.

VII.

For answer to paragraph 7, admits the allegations contained therein except that Charles Brown is a business associate of said John Harrah and William Harrah and respondent denies this particular allegation.

VIII.

For answer to paragraph 8, admits the allegations contained therein.

IX.

Respondent has no information or belief on the subject sufficient to enable him to answer the allegations of paragraph 9, and basing his denial on that ground denies generally and specifically each and every allegation therein contained.

X.

For answer to paragraph 10, this answering respondent denies each and every allegation contained therein, and alleges the true facts to be that Charles Brown and E. A. Gerety, after negotiating with the attorney for the F. R. Cruickshank Co., purchased said conditional sales contract for the sum of \$15,000.00. That prior to the purchase by them negotiations had been had at different times between the attorney for the Cruickshank company and officers and directors of the Abbot Kinney Company to compromise the amount due under said conditional sales contract, but that said alleged bankrupt did not have

the funds with which to pay the demand of the [36] Cruickshank company or neglected to make any settlement thereof or claimed said contract was invalid.

For answer to paragraph 10 on page 4, this answering respondent denies each and every allegation contained therein, except that Charles Brown and E. A. Gerety purchased for \$15,000.00 said conditional sales contract, and that on June 7, 1944, and prior thereto demanded of the alleged bankrupt that a payment be made upon said contract and that an arrangement be worked out to pay the balance due thereon in installments, and that said alleged bankrupt agreed, in consideration of an extension of time, to pay the sum of \$7,500.00 and thereafter on November 7, 1944, to pay an additional \$30,000.00. That thereafter said sums were paid as agreed upon and the payment on November 7, 1944, at which time petitioner was given a credit of \$50,000.00 for said payment of \$30,000.00, was after the filing of the purported involuntary petition in bankruptcy. That the unpaid balance upon said contract is the sum of \$80,000.00.

XI.

For answer to paragraph 11, this answering respondent denies each and every allegation therein contained.

Further answering said paragraph 11, this respondent alleges that petitioner and all of its officers, agents, servants and employees at all times were familiar with the fact that respondent owned a one-third interest in the contract hereinbefore mentioned.

XII.

For answer to paragraph 12, this answering respondent denies each and every allegation therein contained.

XIII.

For answer to paragraph 13, this answering respondent denies each and every allegation therein contained. [37]

XIV.

For answer to paragraph 14, this answering respondent denies each and every allegation therein contained.

XV.

For answer to paragraph 15, this answering respondent admits the allegations therein contained.

XVI.

For answer to paragraph 16, this answering respondent denies each and every allegation therein contained.

XVII.

For answer to paragraph 17, this answering respondent denies each and every allegation therein contained.

Wherefore, this answering respondent prays that this court dismiss the above-entitled proceeding and enter such an order in that connection as is just and proper in the premises.

E. A. GERETY

Respondent

DON M. KITZMILLER

Attorney for Respondent [38]

[Verified.]

[Endorsed]: Filed Jul. 23, 1945 at min. past 10 A. M. Hugh L. Dickson, Referee; Clerk JB.

[Endorsed]: Filed Sep. 12, 1945. [39]

[Title of District Court and Cause.]

ANSWER OF WILLIAM HARRAH TO PETITION
FOR ORDER TO SHOW CAUSE

Comes Now William Harrah, and for his answer to the petition for an order to show cause, as filed by Abbott-Kinney Company, a corporation, the alleged bankrupt above named, admits, denies and alleges:

I.

Admits all of the allegations set forth in paragraphs I, II, V, VI, VIII and XV of said petition.

II.

Denies, both generally and specifically, each and every allegation set forth in paragraphs VII, IX, XI, XII, XIII, XIV, XVI, and XVII of said petition.

III.

Admits all of the allegations set forth in paragraph III of said petition, except that as to the contract price of said personal property; and in that connection, denies that the contract price thereof was the sum of Four Hundred Thousand (\$400,000.00) [40] Dollars, and alleges that the contract price thereof was the sum of Two Hundred Fourteen Thousand, Five Hundred (\$214,500.00) Dollars.

IV.

Denies, both generally and specifically, each and every allegation set forth in paragraph IV of said petition.

except that this answering respondent claims that Charles Brown, E. A. Gerety and William Harrah are the owners and holders of the seller's interest in said sprinkling contract, and that each of said parties own an undivided one-third interest therein as their sole and separate property, and not in trust for the alleged bankrupt, or any other person; and said respondent denies that the alleged bankrupt is the owner of said sprinkling contract or sprinkling system, or any part or portion thereof.

V.

That as to the first paragraph designated as paragraph X in said petition, this respondent denies, both generally and specifically each and every allegation contained therein, except that this answering respondent admits that during the month of May, 1944, there was then due and owing the sum of One Hundred Thirty-seven Thousand (\$137,000.00) Dollars on said sprinkling contract.

VI.

Answering the second paragraph designated as paragraph X in said petition, this respondent denies, both generally and specifically, each and every allegation contained therein, except that this answering respondent admits that Charles Brown and E. A. Gerety purchased said sprinkling contract from the owner thereof for the sum of Fifteen Thousand (\$15,000.00) Dollars and paid said sum to F. R. Cruickshank Co.; and this answering respondent admits that the above-named alleged bankrupt thereafter paid to said Charles Brown and E. A. Gerety

on account thereof, the sum of Thirty-seven Thousand, Five Hundred (\$37,500.00) Dollars. This [41] answering respondent further alleges that subsequent to said payment, he purchased from said Charles Brown an undivided one-third interest in said contract.

Therefore, this respondent prays that petitioner take nothing by said petition and that it be found and declared that said sprinkling contract is owned by this answering respondent, Charles Brown and E. A. Gerety and that the alleged bankrupt is not the owner thereof.

Dated this 21st day of July, 1945.

WILLIAM HARRAH

By John Harrah

His Agent

Respondent

LESLIE L. HEAP

Attorney for Respondent [42]

[Verified.]

[Endorsed]: Filed Jul. 23, 1945 at min. past 10 A. M. Hugh L. Dickson, Referee; Clerk JB.

[Endorsed]: Filed Sep. 12, 1945. [43]

[Title of District Court and Cause.]

OBJECTION OF CHARLES BROWN TO JURIS-
DICTION OF THIS COURT IN RE ORDER
TO SHOW CAUSE DATED JULY 7, 1945

Now comes respondent Charles Brown and appears specially and objects to the jurisdiction of this court upon the following grounds:

I.

Objects to the jurisdiction of this court and any future proceedings herein on the ground that said amended involuntary petition in bankruptcy does not state facts sufficient to constitute an act of bankruptcy.

II.

That said amended involuntary petition in bankruptcy does not state facts sufficient to give to this court jurisdiction in that no creditors entitled to file an involuntary petition in bankruptcy have signed or joined therein.

III.

That no receiver or trustee has been appointed and the alleged bankrupt cannot invoke the aid of this court to determine a controversy with an adverse claimant. [44]

IV.

That this court does not have possession of the property or of the subject matter of the controversy as set forth in said petition.

V.

That the parties have stipulated and this court has approved said stipulation whereby the controversy between this objecting respondent will be postponed until

the question of whether the above involuntary proceedings will be dismissed or an adjudication entered, all as provided in the stipulation on file herein.

Dated this 23rd day of July, 1945.

COBB & UTLEY

By Francis B. Cobb

Attorneys for Respondent Charles Brown

[Endorsed]: Filed Jul. 23, 1945 at min. past 10 o'clock A. M. Hugh L. Dickson, Referee; Clerk JB.

[Endorsed: Filed Sep. 12, 1945. [45]]

[Title of District Court and Cause.]

OBJECTION OF E. A. GERETY TO JURISDICTION OF THIS COURT IN RE ORDER TO SHOW CAUSE DATED JULY 7, 1945

Now comes respondent E. A. Gerety and appears specially and objects to the jurisdiction of this court upon the following grounds:

I.

Objects to the jurisdiction of this court and any future proceedings herein on the ground that said amended involuntary petition in bankruptcy does not state facts sufficient to constitute an act of bankruptcy.

II.

That said amended involuntary petition in bankruptcy does not state facts sufficient to give to this court jurisdiction in that no creditors entitled to file an involuntary petition in bankruptcy have signed or joined therein.

III.

That no receiver or trustee has been appointed and the alleged bankrupt cannot invoke the aid of this court to determine a controversy with an adverse claimant. [46]

IV.

That this court does not have possession of the property or of the subject matter of the controversy as set forth in said petition.

V.

That the parties have stipulated and this court has approved said stipulation whereby the controversy between this objecting respondent will be postponed until the question of whether the above involuntary proceedings will be dismissed or an adjudication entered, all as provided in the stipulation on file herein.

Dated this 23rd day of July, 1945.

DON M. KITZMILLER

Attorney for Respondent E. A. Gerety [47]

[Verified.]

[Endorsed]: Filed Jul. 23, 1945 at min. past 10 o'clock A. M. Hugh L. Dickson, Referee; Clerk JB.

[Endorsed]: Filed Sep. 12, 1945: [48]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER

To the Honorable Benno M. Brink, Referee in Bankruptcy:

Come now your petitioners, Charles Brown, E. A. Gerety and William Harrah, and petition for review of your Order of August 23, 1945 and the Findings of Fact and Conclusions of Law made in respect thereto, and respectfully show:

I.

That your petitioners were respondents on a Petition and Order to Show Cause issued by the above entitled court, returnable on the 23rd day of July, 1945, and jointly own a certain conditional sales contract wherein F. R. Cruickshank & Co. was vendor and the alleged bankrupt was purchaser, and in respect to the sum of \$30,000.00 disposed of by the Referee in said Order and Findings dated August 23, 1945.

II.

That attached hereto and marked Exhibit "A" are true copies of the Findings of Fact and Conclusions of Law and said Order of August 23, 1945, hereinafter referred to as "Order". [49]

III.

That said Order, Findings of Fact and Conclusions of Law were and are erroneous in the following respects:

1. That the Referee erred in failing to sustain the objection of your Petitioners to the jurisdiction of the

bankruptcy court to proceed on said Order to Show Cause, said objections being in writing and a true copy of the same is attached hereto and marked Exhibit "B" and made a part hereof by reference.

2. That the Referee erred in finding in paragraph III of said Conclusions of Law that said written objections were not well taken and that the above entitled court had jurisdiction to hear and determine the Order to Show Cause forming the subject matter of this review.

3. That the court erred in finding the facts as set forth in paragraph VI of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph VI, page 4 of Exhibit "A".

4. That the court erred in finding the facts as set forth in paragraph XII of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XII, page 5 of Exhibit "A".

5. That the court erred in finding the facts as set forth in paragraph XIII of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XIII, page 6 of Exhibit "A".

6. That the court erred in finding the facts as set forth in paragraphs XIV and XV of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evi-

dence. Said findings complained of are contained in [50] paragraphs XIV and XV, page 6 of Exhibit "A".

7. That the court erred in finding the facts as set forth in paragraph XVII of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XVII, page 6 of Exhibit "A".

8. That the court erred in finding the facts as set forth in paragraph XVIII of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XVIII, page 7 of Exhibit "A".

9. That the court erred in finding the facts as set forth in paragraph XIX of the findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XIX, page 8 of Exhibit "A".

10. That the court erred in finding the facts as set forth in paragraph XX of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XX, page 8 of Exhibit "A".

11. That the court erred in finding the facts as set forth in paragraph XXI of the Findings of Fact insofar as said findings purport to find that the acts as found to have been done therein were done pursuant to or in aid

of a conspiracy or to cheat or defraud the Abbot Kinney Company. Said findings complained of are contained in paragraph XXI, page 8 of Exhibit "A".

12. That the court erred in finding the facts as set forth in paragraph XXII of the Findings of Fact insofar as said findings purport to find that the acts as found to have been done therein were done pursuant to or in aid of a conspiracy or to cheat or defraud the Abbot Kinney Company. Said findings complained of are contained in [51] paragraph XXII, page 9 of Exhibit "A".

13. That the court erred in finding the facts as set forth in paragraphs XXIII and XXIV of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraphs XXIII and XXIV, page 9 of Exhibit "A".

14. That the court erred in finding the facts as set forth in paragraph XXV of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XXV, page 10 of Exhibit "A".

15. That the court erred in finding the facts as set forth in paragraph XXVI of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XXVI, page 10 of Exhibit "A".

16. That the court erred in finding the facts as set forth in paragraph XXVIII of the Findings of Fact in that there is no evidence to support said Findings of Fact

and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XXVIII, page 10 of Exhibit "A".

17. That the court erred in finding the facts as set forth in paragraph XXIX of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XXIX, page 11 of Exhibit "A".

18. That the court erred in finding the facts as set forth in paragraph XXX of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XXX, page 11 of Exhibit "A".

19. That the court erred in finding the facts as set forth [52] in paragraph XXXI of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XXXI, page 11 of Exhibit "A".

20. That the court erred in finding the facts as set forth in paragraph XXXII of the Findings of Fact in that there is no evidence to support said Findings of Fact and said Findings of Fact are contrary to the evidence. Said findings complained of are contained in paragraph XXII, page 11 of Exhibit "A".

21. That the court erred in failing to find the date of the alleged conspiracy.

22. That the court erred in admitting over the objection of Charles Brown hearsay testimony, and later

erred in failing to strike said testimony, the objection, ruling and motion being as follows:

Transcript page 127, line 5 to page 128, line 21.

“Q. What have you told in Directors’ meetings regarding its value?

Mr. Cobb: I object on the ground that it is *here-say* and inadmissible as far as Mr. Brown is concerned.

Mr. Davis: Mr. Brown is a party.

Mr. Cobb: Mr. John Harrah has quitclaimed any claims he has, and it would not be admissible against Mr. Brown or Mr. Gerety that this man might have declared or had an opinion at one time as to the validity or invalidity of the contract. And if the other parties were not there, it would be hearsay.

Mr. Davis: If your Honor please, Mr. John Harrah is a party to this. The fact that he disclaims an interest does not mean that he has been relieved of any—

The Referee: I don’t think so, Mr. Cobb. The evidence shows that Mr. Brown sold half of his interest in [53] this contract to Mr. Harrah’s son for \$3,000, and a part at least of the negotiations for that transfer was handled by Mr. John Harrah. No, the objection is overruled. But try to make your questions as specific as you can, Mr. Davis.

Mr. Cobb: May I say this, your Honor: I will not object to anything that occurred after that date; but I do object to going back since 1937, before there was any such relationship. Counsel charges conspiracy. I think he ought to state when the con-

spiracy was entered into so that we could have some date that we could tie our objections to, not go back to—

The Referee: It is not merely a question of conspiracy. If it be shown that any one in a fiduciary relationship to this corporation purchased a claim against the corporation, then that person may be allowed only what he paid for that claim.

Mr. Cobb: I am not arguing that question; but he is calling for something that occurred in a Directors' meeting when Mr. Davis and Mr. Harrah were talking about this contract, when none of the respondents was present.

The Referee: That doesn't make a bit of difference. It is all a part of the general question. If it be shown that the witness John Harrah took one attitude toward this contract while it was in the hands of the Cruickshank Company and took another attitude when it was in the hands of Charles Brown, who concedes that he held it in trust partially for the general manager of the company, that may be a very important circumstance. The objection is overruled. Go ahead, Mr. Davis. Make your questions as specific as you can." [54]

Transcript page 138, line 2 to page 139, line 17.

"Mr. Davis: Q. Did you, Mr. Harrah, express a consistent position as to the payment on account of the F. R. Cruickshank Company in the meetings of the Board of Directors?

Mr. Cobb: We object on the ground that it is ambiguous as to "consistent", and that—

The Referee: "Consistent" means did he continuously advocate the same course of treatment or the same position, or did he at some time or other change his position. The objection is overruled.

The Witness: Yes, I maintained a consistent position.

Mr. Davis: Q. Now what was that position which you maintained?

Mr. Cobb: We object on the ground that it calls for the conclusion of the witness and that no proper foundation has been laid.

The Referee: Well, we will interpret the question to mean the substance of what he said. The objection is overruled.

Mr. Cobb: And when, your Honor? I mean, that is important.

The Referee: The time is whenever the matter came up for discussion at the Directors' meetings at which Mr. John Harrah was present.

Mr. Cobb: I object to any time before there is any charge that Mr. Brown had anything to do with this contract.

The Referee: The objection is overruled. Proceed.

The Witness: Well, there was—that sprinkler contract was not mentioned in many Directors' meetings. In fact, your records will show that there weren't many Directors' meetings. There were very few over the period of [55] the last four years, I would say.

Mr. Davis: Q. Between 1937 and 1941—we will limit our time to those years to start with now—

A. I don't know how many Directors' meetings there were. There weren't many then.

Mr. Cobb: I want to interpose an objection to that period of time. It is too remote. It has no bearing on the issues of this case, what he might have thought in 1941 or 1944, when they charge that this was acquired under a conspiracy. It is too remote to have any bearing on the issues here.

The Referee: Overruled. Go on."

23. That the court erred in not admitting evidence and as to the obligations of the Abbot Kinney Company at the time of the payment of the \$7,500.00 to Charles E. Brown, and in respect to the bond issue being an obligation of the company, for the reason that the same was outlawed by the Statute of Limitations. The exclusion of the evidence and the offer of proof as set forth in transcript page 209, line 25 to page 213, line 17, is as follows:

"Q. Mr. Harrah, at the time of the payment of this \$7500 in June, 1944, were there any large creditors of the Abbot Kinney Company except—

A. The only large creditors are current creditors. They paid all creditors on the 10th of the month.

Mr. Davis: Your Honor, I object to the question on the ground that it is incompetent, irrelevant, and immaterial so far as this particular proceeding is concerned. I think it goes to the question of the precise—that that is not involved in this particular phase of the investigation.

The Referee: How will it help you, counsel?

Mr. Kitzmiller: Merely this, that counsel—and [56] this is merely cross examination—went into the question of the moneys on hand in June and November and the payment of \$30,000 at one time, \$7500 at another time; and I would like to know whether or not there was any outstanding obligation at those particular times other than this matter of the insurance company—not the insurance company, this personal injury judgment—that would show that there were no funds with which this \$30,000 could be paid or the \$30,000 was taken from some other legitimate expense and turned over to these people without this money, all of it, being in the company treasury, being really necessary for allocation to other purposes.

The Referee: Objection sustained. Proceed.

Mr. Cobb: Your Honor, on that I think we should make an offer of proof, that there were no other creditors—the \$15,000 that was mentioned as a judgment was later paid by the insurance carrier. And there were no obligations other than current bills and that condition extended down to the payment of the \$30,000 in November.

Mr. Davis: We object to the offer of proof.

The Referee: You owed \$320,000 on the bond issue, did you not?

Mr. Davis: Substantially that and over \$100,000 in taxes.

The Referee: I think the whole thing is immaterial to this hearing. It will be material if we get

to the hearing on the involuntary petition. But it is immaterial to the issues here.

Mr. Cobb: So far as the bond issue is concerned we can go into that—

The Referee: You see where we are going to lead to if we go into the question of the solvency or insolvency [57] of this company in this hearing, or the present liabilities of the company. We are just going to extend this into the involuntary petition, and these matters have not been consolidated for hearing. It is entirely immaterial what the financial condition of the company was. It is material, I think, to know the cash resources of the company at the various times that are of importance here; but what the liabilities of the company were, that is immaterial.

Mr. Cobb: I want the record to be clear on my position. My position is this—

The Referee: You may make an offer of proof, Mr. Cobb.

Mr. Cobb: The offer of proof will be that the bond issue which your Honor has mentioned was outlawed by the statute of limitations so far as any liability against the assets of this corporation; that there were no merchandise creditors or creditors other than for current obligations that had an enforceable claim against the assets of the corporation; that the taxes due were real estate taxes against the particular parcels of real property; that the obligation under the sprinkler contract and the obligation to the trustee on the bond indenture constituted the obligations of the company.

The Referee: Is there an objection?

Mr. Davis: Oh, yes, we object to it, your Honor, on the ground that it is incompetent, irrelevant, and immaterial, and has no bearing on the issues presented in this particular proceeding.

The Referee: The objection is sustained.

Mr. Heap: Let the record show the same objection on behalf of William Harrah, your Honor.

Mr. Kitzmiller: The same objection on behalf of Mr. Gerety with an additional offer to the effect that the [58] assets—an offer to prove that the assets of the company were in no event, under any consideration, irrespective of any of the liabilities, equal to or capable of—or equal to the amount of the bond issue outstanding, irrespective of any question of interest on the bond issue; also a further offer that, as to these taxes spoken of, we would prove by this witness that these taxes were not taxes on any of the operative property—

The Referee: Make your offer of proof, counsel. If you don't know what it is, don't ask some other attorney. Go ahead. Have you finished?

Mr. Kitzmiller: Yes.

The Referee: Is there any objection?

Mr. Davis: We object on the same grounds.

The Referee: Objection sustained. Is there any objection to the offer of proof on behalf of William Harrah?

Mr. Davis: We make the same objection, your Honor, to all offers of proof, as I said.

Mr. Cobb: I am not clear whether I made any offer from the period of June 23, I believe the date

of the \$7500 payment, to the payment of the \$30,000 on November 8th. I want to be sure that those two periods and dates are covered in my offer."

24. That the court erred in permitting hearsay testimony in respect to a conversation between Louis Halper and John Harrah over the objection of petitioners in refusing thereafter to strike said testimony.

Transcript 364, lines 18 to 22 inclusive:

"Q. What was said in those meetings in relation to the Abbot Kinney Company, Cruickshank Company contract?

Mr. Cobb: To which we object on the ground that it is hearsay as far as respondent Brown is concerned. [59]

The Referee: Overruled."

Transcript 420, line 21 to 422, line 2:

"Mr. Davis: Mr. Newton may be excused. I think that is our case, your Honor.

The Referee: Who wants to go forward?

Mr. Cobb: As this time I will move to strike the testimony given by Mr. Halper in respect to a conference between Mr. Williams and Mr. John Harrah, where Mr. Brown was not present and there is no—the only possible ground on which that could be admissible or binding would be on the ground that there was a conspiracy; and the petitioner having closed his case and no conspiracy having been established, I submit it is hearsay and—

The Referee: Why do you say no conspiracy has been established?

Mr. Cobb: Because there has been no evidence at all that there was any conspiracy between Mr. Harrah; and the evidence is undisputed that Mr. Harrah did not know that Mr. Gerety and Mr. Brown were going to negotiate for this contract until after it was already purchased. The evidence is undisputed that he told Mr. Brown that in his opinion he should not buy it because he would have a lot of trouble, like that the Cruickshank people had, in trying to collect, and that a deficiency was not good if the bonds were foreclosed; that it would probably cause a bond foreclosure if somebody bought the contract; and that there is not one word of evidence showing any joint plan, scheme, or design on behalf of Mr. Harrah with Mr. Gerety and Mr. Brown in acquiring this contract.

The Referee: The motion is denied.

Mr. Kitzmiller: I make the same motion in so far as Mr. Gerety is concerned, your Honor. [60]

The Referee: The motion is denied.

Mr. Vernon: I would like also to make the same motion in regard to my client, William Harrah.

The Referee: The motion is denied."

25. The court erred in finding as a fact and drawing conclusions of law and order in finding that there was any conspiracy between your petitioners or any of them, and further erred in finding that your petitioners or any of them owed to the corporation a fiduciary relationship in respect to the purchase and acquisition of

the F. R. Cruickshank & Co.'s conditional sales contract where said corporation had been given the opportunity to purchase the same and had declined so to do.

26. That the court erred in creating constructive trust in respect to said conditional sales contract with F. R. Cruickshank & Co. and in respect to the moneys paid by the corporation to petitioners Charles Brown and E. A. Gerety.

IV.

That the Conclusions of Law are erroneous and Charles Brown, E. A. Gerety and William Harrah except to said Conclusions of Law in respect to the recitals contained in paragraphs I, II, III, IV and V thereof.

V.

That said Order of August 23, 1945 is erroneous and contrary to the facts, evidence and law wherein it is ordered:

1. That Abbot Kinney Company, the alleged bankrupt, is the owner of that certain sprinkling system installed by F. R. Cruickshank & Co. under a conditional sales contract, free and clear of said conditional sales contract.

2. That neither E. A. Gerety, Charles Brown nor William Harrah has any right to collect any money on account of said conditional sales contract or to exercise any rights or to enforce any obligations thereunder as against Abbot Kinney Company. [61]

3. Wherein it was ordered that the Clerk of this Court turn over and deliver to Abbot Kinney Company the sum of \$22,500.00 now on deposit with said Clerk.

Wherefore your petitioners, feeling aggrieved because of such Order and Findings of Fact and Conclusions of Law made in connection therewith, pray that the same be reviewed as provided in Section 39c of the National Bankruptcy Act, and that said Order be reversed, set aside and annulled.

That your petitioners recover their costs and be granted such other relief and orders as may be proper in the premises.

That the Referee compare his certificate and attach thereto the reporter's transcript and the originals of all exhibits offered and received in connection with said proceeding, and the originals of the following documents: Amended Involuntary Petition and Answer thereto, Amended Answer to the Amended Involuntary Petition, the original Petition and Order to Show Cause on which the order sought to be reviewed was based, the Objection of Charles Brown to Jurisdiction of this Court in re Order to Show Cause dated July 7, 1945, the Answer of Charles Brown to Petition and Order to Show Cause dated July 7, 1945, Petition in Intervention in Opposition to Amended Involuntary Petition, and Notice of Motion on Petition to Intervene.

CHARLES BROWN
E. A. GERETY and
WILLIAM HARRAH
By Charles Brown

COBB & UTLEY
D. M. KITZMILLER and
LESLIE L. HEAP

Attorneys for Petitioners
By Francis B. Cobb [62]

EXHIBIT "A"

In the District Court of the United States
Southern District of California
Central Division

In Bankruptcy No. 43,551 O'C.

In the Matter of ABBOT KINNEY COMPANY, a
corporation, Alleged Bankrupt.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The hearing on the Order to Show Cause why that certain sprinkling system installed by F. R. Cruickshank & Company on the property of Abbot Kinney Company, the alleged bankrupt, at Venice, Los Angeles, California, should not be determined to be owned by said Abbot Kinney Company, the alleged bankrupt, free and clear of any and all liens, liabilities or claims and why the sum of \$30,000 deposited with the Clerk of this court should not be returned to Abbot Kinney Company, the alleged bankrupt, directed to Charles Brown, E. A. Gerety, William Harrah and John Harrah, came on regularly for hearing on the 23rd day of July, 1945, at the hour of 10 o'clock A. M. before the Honorable Hugh L. Dickson, Referee presiding, in Room 343, Federal Building, Los Angeles, California, Messrs. Grainger & Hunt by Kyle Z. Grainger, Esq., and Messrs. Nicholas & Davis by M. Phillip Davis, Esq., appearing for the alleged bankrupt; Francis B. Cobb, Esq., appearing for respondent Charles Brown; D. M. Kitzmiller, Esq., appearing for respondent E. A. Gerety; Leslie L. Heap, Esq., appearing for the respondent William Harrah; and respondent John Harrah

appearing in [63] *propria persona*; and written objections by respondents Charles Brown and E. A. Gerety to the jurisdiction of this Court having been filed, which objections were orally adopted by the respondent William Harrah, and the matter having been considered and the Referee having determined that the objections to the jurisdiction of the Court were not well taken and that the Referee had jurisdiction to hear said Order to Show Cause, and D. M. Kitzmiller, Esq., on behalf of respondent E. A. Gerety, having objected to the said Referee, Hugh L. Dickson, continuing with the hearing on said Order to Show Cause, on the ground that said Referee Hugh L. Dickson had indicated prejudice against certain of the respondents and the Hon. Hugh L. Dickson having determined that he was not prejudiced against any of said respondents but rather than try said Order to Show Cause in the face of such objections, that the same should be transferred to the Hon. Benno M. Brink, as Referee in Bankruptcy, to which assignment said respondents, and each of them, consented in open court, and said Order to Show Cause having then been assigned for hearing before the said Hon. Benno M. Brink, as Referee in Bankruptcy by an order duly given and made by said Referee Hugh L. Dickson, pursuant to and in the manner provided by the Rules of Court, and an order of General reference of the entire bankruptcy proceedings in the above entitled matter to the Hon. Benno M. Brink, as Referee in Bankruptcy, having thereafter been duly given and made, and the Hon. Benno M. Brink having accepted such assignment and said general reference as Referee in Bankruptcy, and the objection to the jurisdiction of the court having been renewed by respondents Charles Brown, E. A. Gerety and William Harrah before

the Hon. Benno M. Brink, as Referee in Bankruptcy, on the same grounds as those theretofore urged before the Hon. Hugh L. Dickson, Referee, and said Hon. Benno M. Brink, as Referee, having sustained the ruling theretofore given by the Hon. Hugh L. Dickson, Referee, that the court did have jurisdiction to hear and determine said Order to Show Cause; and evidence, both oral and documentary, having been intro- [64] duced and the matter having been heard before said Hon. Benno M. Brink, Referee presiding, on the 24th, 25th, 26th and 27th day of July, 1945, the Referee now makes his Findings of Fact and Conclusions of Law as follows:

I.

It is true that on the 21st day of October, 1944, a Petition in Involuntary Bankruptcy was filed in the District Court of the United States, Southern District of California, Central Division, against Abbot Kinney Company, a California corporation.

It is true that thereafter and on the 28th day of February, 1945, a First Amended Involuntary Petition in Bankruptcy was filed in said proceedings.

It is true that an Answer and a First Amended Answer to said First Amended Involuntary Petition were filed and the matter is now pending before the above entitled court.

II.

It is true that no Receiver has been appointed in this proceeding.

III.

It is true that the objection of Respondents E. A. Gerety, William Harrah, John Harrah and Charles Brown to the jurisdiction of this court, is not well taken.

It is true that this court has jurisdiction to hear and determine the Order to Show Cause above referred to.

IV.

It is true that John Harrah was at all times since the 23rd day of December, 1937, and now is a member of the Board of Directors of the alleged Bankrupt, Abbot Kinney Company.

V.

It is true that on the 6th day of April, 1938, an Executive Committee was created by action of the Board of Directors of Abbot Kinney Company, the alleged bankrupt, and given authority to carry on [65] the business of said Abbot Kinney Company during the intervals between the meetings of its Board of Directors.

It is true that at all times from and after the 2nd day of January, 1940, to and including the 13th day of November, 1944, said Executive Committee of Abbot Kinney Company was composed of the following persons: John Harrah, Carleton Kinney and Alfred A. Newton.

VI.

It is true that Carleton Kinney was at all times herein mentioned, under the domination and control of John Harrah and voted at the meetings of the Executive Committee of Abbot Kinney Company as and in the manner directed by said John Harrah.

VII.

It is true that on the 2nd day of June, 1931, F. R. Cruickshank & Company entered into a conditional sales contract in writing with Abbot Kinney Company, the alleged bankrupt, to install on the property of Abbot Kinney Company at Venice, Los Angeles, California, a sprinkling system, at and for a purchase price of approximately \$214,000.00, of which sum \$137,000. remained unpaid until the payments to Charles Brown, hereinafter mentioned, were made.

It is true that pursuant to said conditional sales contract, said sprinkling system was installed by said F. R. Cruickshank & Company on the properties of said alleged bankrupt at Venice, Los Angeles, California.

VIII.

It is true that prior to and at the time of the filing of the above mentioned involuntary petition in bankruptcy and continuously since then, Abbot Kinney Company, the alleged bankrupt, has been and now is in possession of said sprinkling system.

IX.

It is true that E. A. Gerety was at all times during the transactions herein mentioned, the General Manager of Abbot Kinney Company and was its chief executive officer in charge of its business, [66] subject to the orders and directions of the executive committee.

X.

It is true that William Harrah and Charles Brown, and each of them, at all times from and after January 2, 1940, knew that John Harrah was a member of the Executive Committee and a member of the Board of

Directors of Abbot Kinney Company, and that E. A. Gerety was its General Manager and chief executive officer in charge of its business.

XI.

It is true that at all times herein mentioned, Charles Brown was a close intimate friend and business associate of John Harrah and William Harrah.

XII.

It is true that some time prior to the 13th day of June, 1944, and subsequent to the 2nd day of January, 1940, at the instance and instigation of John Harrah, an unconscionable conspiracy was knowingly, willfully and fraudulently entered into between John Harrah, William Harrah, Charles Brown and E. A. Gerety, to defraud and cheat the Abbot Kinney Company out of a substantial portion of its assets by having the Executive Committee of Abbot Kinney Company refuse to purchase the above mentioned conditional sales contract on the sprinkling system from F. R. Cruickshank & Company for and on behalf of the Abbot Kinney Company, but on the contrary, to have the respondent, Charles Brown, purchase said conditional sales contract in his own name for and on behalf of and as undisclosed agent for said conspirators and for their personal benefit at as low a figure as he could negotiate and to thereafter demand from Abbot Kinney Company its payment, and to have said Executive Committee, at the instance and request and through the influence of John Harrah, authorize and order the payment to Charles Brown, of said conditional sales contract, as rapidly as money of Abbot Kinney Company was available. [67]

XIII.

It is true that John Harrah, William Harrah, Charles Brown and E. A. Gerety at all times herein mentioned knew that said conditional sales contract was junior to an outstanding bonded indebtedness of the alleged bankrupt in the principal sum of \$269,000.00, with unpaid interest at 7% since 1932, and junior to the lien of outstanding real estate taxes in excess of \$75,000. and that said conditional sales contract had little or no value in the possession of a person not in control of spending the money of Abbot Kinney Company.

XIV.

It is true that in furtherance of said conspiracy to defraud and cheat Abbot Kinney Company, the alleged bankrupt, and as a part thereof, John Harrah and Carleton Kinney, as members of said Executive Committee of Abbot Kinney Company, knowingly, fraudulently and willfully refused to accept an offer made by F. R. Cruickshank & Company on or about June 6th, 1944, to sell said sprinkling system contract for \$10,000.00.

XV.

It is true that thereafter and in furtherance of said conspiracy to defraud and cheat Abbot Kinney Company, and as a part thereof, on June 13th, 1944, Charles Brown obtained an assignment in writing, in his own name, of said conditional sales contract from F. R. Cruickshank & Company, for which assignment F. R. Cruickshank & Company received \$15,000.00.

XVI.

It is true that at all times herein mentioned, E. A. Gerety and John Harrah had full and complete access

to the books and accounts of Abbot Kinney Company and knew the cash position of Abbot Kinney Company.

XVII.

It is true that after the 13th day of June and prior to the 20th day of June, and in violation of their respective fiduciary [68] obligations to the Abbot Kinney Company and in furtherance of said conspiracy to defraud and cheat Abbot Kinney Company, and as part thereof, E. A. Gerety and John Harrah told Charles Brown that the Abbot Kinney Company had \$7,500.00 which could and would be paid on account of said conditional sales contract, if demand therefor was made.

XVIII.

It is true that thereafter and on the 20th day of June, 1944, and as a part of said conspiracy to defraud and cheat Abbot Kinney Company, the alleged bankrupt, and in furtherance thereof, said Charles Brown appeared before the Executive Committee of Abbot Kinney Company, at which time John Harrah and Carleton Kinney were present, and demanded that \$7,500.00 be paid on account of said conditional sales contract.

It is true that at the time said demand for payment of \$7,500.00 was made by said Charles Brown, no money had been paid on said conditional sales contract since the year 1932, all of which both Carleton Kinney and John Harrah well knew.

It is true that John Harrah had, on many occasions prior to the 20th day of July, 1944, and during the period he was on said Executive Committee of Abbot Kinney Company and a member of the Board of Directors thereof, stated that said conditional sales contract was of no

value and that he would not consent to the payment of any moneys on account thereof so long as the bonded indebtedness of Abbot Kinney Company, the alleged bankrupt, remained unpaid.

It is true that at the time said Charles Brown appeared before said Executive Committee on said 20th day of June, 1944, as aforesaid, John Harrah, in furtherance of said conspiracy to defraud and cheat Abbot Kinney Company, the alleged bankrupt, and as a part thereof, told Carleton Kinney that \$7,500.00 should be paid on account of said conditional sales contract, and instructed said Carleton Kinney to vote such payment. [69]

It is true that said Carleton Kinney and said John Harrah did then and there vote to pay \$7,500. of the cash of Abbot Kinney Company to Charles Brown for and on account of said conditional sales contract.

XIX.

It is true that thereafter and in furtherance of said conspiracy to cheat and defraud Abbot Kinney Company, the alleged bankrupt, and as a part thereof, said Carleton Kinney and John Harrah signed a check of Abbot Kinney Company in the sum of \$7,500, made payable to said Charles Brown, and had the same delivered to said Charles Brown, which check was thereafter cashed and the money obtained thereon by said Charles Brown.

XX.

It is true that prior to the 7th day of November, 1944, and in violation of their respective fiduciary obligations to the Abbot Kinney Company and in furtherance of said conspiracy, and as a part thereof, E. A. Gerety and John Harrah told Charles Brown that the Abbot Kinney Com-

pany had \$30,000. which could and would be paid on account of said conditional sales contract, if demand therefor was made.

XXI.

It is true that thereafter and pursuant to said conspiracy to cheat and defraud Abbot Kinney Company, the alleged bankrupt, and as a part thereof, and on the 7th day of November, 1944, and after the above mentioned involuntary petition in bankruptcy had been filed against said Abbot Kinney Company, that the said John Harrah and Carleton Kinney again held a meeting of the Executive Committee, at which time said Charles Brown appeared and made a demand for the payment of an additional \$30,000. on account of said conditional sales contract and stated that if the same were not paid, the water would be turned off from said sprinkling system.

It is true that in furtherance of said conspiracy to cheat [70] and defraud Abbot Kinney Company, the alleged bankrupt, and as a part thereof, said John Harrah told Carleton Kinney that \$30,000. should be paid on account of said contract, and instructed Carleton Kinney to vote such payment.

It is true that John Harrah and Carleton Kinney did then vote to pay said sum of \$30,000. to Charles Brown for and on account of said conditional sales contract.

XXII.

It is true that thereafter and in furtherance of said conspiracy to cheat and defraud Abbot Kinney Company, the alleged bankrupt, and as a part thereof, said Carleton Kinney and John Harrah signed a check of Abbot Kinney Company in the sum of \$30,000. made payable to said

Charles Brown, and had the same delivered to said Charles Brown, which check was thereafter cashed and the money obtained thereon, by said Charles Brown.

XXIII.

It is true that at all times herein mentioned and during the above mentioned transactions, John Harrah and E. A. Gerety held fiduciary positions with Abbot Kinney Company and were not free to act in a manner contrary or antagonistic to the best interests of Abbot Kinney Company.

XXIV.

It is true that Abbot Kinney Company was financially able to purchase said conditional sales contract from F. R. Cruickshank & Company at and for the price of \$10,000. at the time it was offered to it, on or about June 6, 1944, and that said Abbot Kinney Company would have purchased the same at such price if it had not been prevented from doing so by the above mentioned conspiracy instigated, conceived and executed by John Harrah with the help, assistance and connivance of William Harrah, E. A. Gerety and Charles Brown, as aforesaid.

It is true that it would have been for the best interests of Abbot Kinney Company, the alleged bankrupt, to have purchased said [71] conditional sales contract for \$10,000. at the time the same was offered to it on June 6, 1944.

XXV.

It is true that the written assignment of said conditional sales contract was taken from F. R. Cruickshank & Company in the name of Charles Brown for the benefit of E. A. Gerety, John Harrah, William Harrah and Charles Brown and as a part of and in furtherance of

said conspiracy to cheat and defraud Abbot Kinney Company, the alleged bankrupt, and for the purpose of misleading Abbot Kinney Company and its directors and officers other than John Harrah, of the interests therein held by John Harrah, William Harrah and E. A. Gerety.

XXVI.

It is true that all of said acts of said E. A. Gerety and John Harrah, as above set forth, in connection with the acquisition of and payment on account of said conditional sales contract, were in violation of the fiduciary obligations and duties owing by said E. A. Gerety and John Harrah to said Abbot Kinney Company, of which Charles Brown and William Harrah well knew.

It is true that all of said acts were done for the purpose of and with the intent of defrauding and cheating said Abbot Kinney Company and its creditors and estate, and for the benefit of said Charles Brown, E. A. Gerety, William Harrah and John Harrah and contrary to the best interests of said Abbot Kinney Company.

XXVII.

It is true that the sum of \$30,000. above referred to, was deposited with the Clerk of the above entitled Court as a court of bankruptcy, pursuant to an amended stipulation and order approving same on file in this matter, and that said sum is now under the control and direction, and subject to the order of this court in this proceeding.

XXVIII.

It is true that on the 30th day of November, 1944, William [72] Harrah advised the alleged bankrupt, Abbot Kinney Company, in writing, that he had purchased a one-

third interest in the unpaid balance due on said conditional sales contract, on the 25th day of November, 1944.

It is true that said notice was sent to Abbot Kinney Company in furtherance of and as a part of said conspiracy to cheat and defraud Abbot Kinney Company, the alleged bankrupt, and was given for the purpose of misleading the alleged bankrupt as to the date on which said William Harrah obtained his interest in said conditional sales contract.

XXIX.

It is true that none of the respondents herein were qualified under the Bankruptcy Act on behalf of Abbot Kinney Company, the alleged bankrupt, or at all, to defend against the involuntary petition in bankruptcy filed herein, or to raise any issues regarding the sufficiency of the original or amended involuntary petition in bankruptcy filed herein.

XXX.

It is true that Abbott Kinney Company, the alleged bankrupt, owns the sprinkling system installed by F. R. Cruickshank & Company, free and clear of said conditional sales contract.

XXXI.

It is true that neither E. A. Gerety, Charles Brown, John Harrah nor William Harrah has any rights to collect any money on account of said conditional sales contract from Abbot Kinney Company, the alleged bankrupt, or to exercise any rights or enforce any obligations thereunder as against Abbot Kinney Company, the alleged bankrupt.

XXXII.

It is true that Abbot Kinney Company, the alleged bankrupt, is entitled to receive \$22,500. of said money now on deposit with the Clerk of the above entitled Court, as a court of bankruptcy, and said Charles Brown and E. A. Gerety are entitled to receive the remaining \$7500. thereof. [73]

XXXIII.

Except as otherwise hereinabove specifically found, all of the allegations of the Petition for Order to Show Cause are true and none of the allegations of the respective Objections to Jurisdiction or of the Answers to the Petition for Order to Show Cause of the Respondents, filed herein, are true.

CONCLUSIONS OF LAW

From the foregoing facts, the Referee makes the following Conclusions of Law:

I.

That neither E. A. Gerety, William Harrah, Charles Brown nor John Harrah were qualified under the Bankruptcy Act, on behalf of Abbot Kinney Company, the alleged bankrupt, or at all, to defend against the Involuntary Petition in Bankruptcy filed herein, or to raise any issue regarding the sufficiency of the original or amended Involuntary Petition in Bankruptcy filed herein.

II.

That this Court has jurisdiction to hear and determine all of the issues raised by the Order to Show Cause above referred to and the answers of respondents filed thereto.

III.

That the sprinkling system installed by F. R. Cruickshank & Company on the property of Abbot Kinney Company, the alleged bankrupt, at Venice, Los Angeles, California, pursuant to that certain conditional sales contract entered into by and between F. R. Cruickshank & Company and Abbot Kinney Company on or about June 2, 1931, is owned by Abbot Kinney Company free and clear of said conditional sales contract.

IV.

That neither E. A. Gerety, Charles Brown, John Harrah nor William Harrah has any right to collect any money on account of said [74] conditional sales contract, or to exercise any rights or enforce any obligations thereunder, as against Abbot Kinney Company, the alleged bankrupt.

V.

That Abbot Kinney Company, the alleged bankrupt, is entitled to receive \$22,500.00 of said money now on deposit with the Clerk of the above entitled court, as a court of bankruptcy.

VI.

That Charles Brown is entitled to receive \$7500.00 of said money now on deposit with the Clerk of the above entitled court, as a court of bankruptcy.

Let the Order Be Entered Accordingly.

Dated: August 23, 1945.

BENNO M. BRINK

Referee [75]

EXHIBIT "A"

In the District Court of the United States
Southern District of California
Central Division

In Bankruptcy No. 43,551 O'C.

In the Matter of ABBOT KINNEY COMPANY, a
corporation, Alleged Bankrupt.

ORDER DIRECTING CLERK OF THE COURT TO
PAY MONIES ON DEPOSIT TO ABBOT
KINNEY COMPANY, ET AL., AND DETER-
MINING TITLE TO SPRINKLING SYSTEM

At Los Angeles, in said District, on the 23rd day of
August, 1945, before the Honorable Benno M. Brink,
Referee presiding:

The hearing on the Order to Show Cause why that
certain sprinkling system installed by F. R. Cruickshank
& Company on the property of Abbot Kinney Company,
the alleged bankrupt, at Venice, Los Angeles, California,
should not be determined to be owned by said Abbot
Kinney Company, the alleged bankrupt, free and clear
of any and all liens, liabilities or claims and why the
sum of \$30,000 deposited with the Clerk of this court
should not be returned to Abbot Kinney Company, the
alleged bankrupt, directed to Charles Brown, E. A. Gerety,
William Harrah and John Harrah, came on regularly for
hearing on the 23rd day of July, 1945, at the hour of
10 o'clock A. M. before the Honorable Hugh L. Dickson,
Referee presiding, in [76] Room 343, Federal Building,
Los Angeles, California, Messrs. Grainger & Hunt by
Kyle Z. Grainger, Esq., and Messrs. Nicholas & Davis by

M. Philip Davis, Esq., appearing for the alleged bankrupt; Francis B. Cobb, Esq., appearing for respondent Charles Brown; D. M. Kitzmiller, Esq., appearing for respondent E. A. Gerety; Leslie L. Heap, Esq., appearing for the respondent William Harrah; and respondent John Harrah appearing in propria persona; and written objections by respondents Charles Brown and E. A. Gerety to the jurisdiction of this Court having been filed, which objections were orally adopted by the respondent William Harrah, and the matter having been considered and the Referee having determined that the objections to the jurisdiction of the Court were not well taken and that the Referee had jurisdiction to hear said Order to Show Cause, and D. M. Kitzmiller, Esq., on behalf of respondent E. A. Gerety, having objected to the said Referee, Hugh L. Dickson, continuing with the hearing on said Order to Show Cause, on the ground that said Referee Hugh L. Dickson had indicated prejudice against certain of the respondents and the Hon. Hugh L. Dickson having determined that he was not prejudiced against any of said respondents but rather than try said Order to Show Cause in the face of such objections, that the same should be transferred to the Hon. Benno M. Brink, as Referee in Bankruptcy, to which assignment said respondents, and each of them, consented in open court, and said Order to Show Cause having been assigned for hearing before the said Hon. Benno M. Brink, as Referee in Bankruptcy by an order duly given and made by said Referee Hugh L. Dickson, pursuant to and in the manner provided by the Rules of Court, and an order of general reference of the entire bankruptcy proceedings in the above entitled matter to the Hon. Benno M.

Brink, as Referee in Bankruptcy, having thereafter been duly given and made, and the Hon. Benno M. Brink having accepted such assignment and said general reference as Referee in Bankruptcy, and the objection to the jurisdiction of the [77] court having been renewed by respondents Charles Brown, E. A. Gerety and William Harrah before the Hon. Benno M. Brink, as Referee in Bankruptcy, on the same grounds as those theretofore urged before the Hon. Hugh L. Dickson, Referee, and said Hon. Benno M. Brink, as Referee, having sustained the ruling theretofore given by the Hon. Hugh L. Dickson, Referee, that the court did have jurisdiction to hear and determine said Order to Show Cause; and evidence, both oral and documentary, having been introduced and the matter having been heard before said Hon Benno M. Brink, Referee presiding, on the 24th, 25th, 26th and 27th day of July, 1945, and the Referee having made and filed herein, his Findings of Fact and Conclusions of Law:

It Is Ordered that Abbot Kinney Company, the alleged bankrupt, is the owner of that certain sprinkling system installed by F. R. Cruickshank & Company on the property of Abbot Kinney Company, the alleged bankrupt, at Venice, Los Angeles, California, pursuant to that certain conditional sales contract entered into by and between F. R. Cruickshank & Company and Abbot Kinney Company on or about June 2, 1931, free and clear of said conditional sales contract; and,

It Is Further Ordered that neither E. A. Gerety, Charles Brown, John Harrah nor William Harrah has any right to collect any money on account of said conditional sales contract or to exercise any rights or to enforce any obligations thereunder as against Abbot Kinney Company, the alleged bankrupt; and,

It Is Further Ordered that the clerk of the above entitled court, as a court of bankruptcy, forthwith turn over and deliver to Abbot Kinney Company, the alleged bankrupt, the sum of \$22,500.00 now on deposit with said clerk; and,

It Is Further Ordered that the clerk of the above entitled court, as a court of bankruptcy, forthwith turn over and deliver to Charles Brown, the sum of \$7500.00; and, [78]

It Is Further Ordered that neither E. A. Gerety, William Harrah, Charles Brown nor John Harrah were qualified under the Bankruptcy Act, on behalf of Abbot Kinney Company, the alleged bankrupt, or at all, to defend against the Involuntary Petition in Bankruptcy filed herein, or to raise any issue regarding the sufficiency of the original or amended Involuntary Petition in Bankruptcy filed herein; and,

It Is Further Ordered that this Court has jurisdiction to hear and determine all of the issues raised by the Order to Show Cause above referred to and the Answers of respondents filed thereto.

BENNO M. BRINK

Referee in Bankruptcy [79]

EXHIBIT "B"

In the District Court of the United States for the
Southern District of California
Central Division
No. 43551-O'C.

In the Matter of ABBOT KINNEY COMPANY, a
California corporation, Alleged Bankrupt.

OBJECTION OF CHARLES BROWN TO JURIS-
DICTION OF THIS COURT IN RE ORDER TO
SHOW CAUSE DATED JULY 7, 1945

Now comes respondent Charles Brown and appears specifically and objects to the jurisdiction of this court upon the following grounds:

I.

Objects to the jurisdiction of this court and any future proceedings herein on the ground that said amended involuntary petition in bankruptcy does not state facts sufficient to constitute an act of bankruptcy.

II.

That said amended involuntary petition in bankruptcy does not state facts sufficient to give to this court jurisdiction in that no creditors entitled to file an involuntary petition in bankruptcy have signed or joined therein.

III.

That no receiver or trustee has been appointed and the alleged bankrupt cannot invoke the aid of this court to determine a controversy with an adverse claimant. [80]

IV.

That this court does not have possession of the property or of the subject matter of the controversy as set forth in said petition.

V.

That the parties have stipulated and this court has approved said stipulation whereby the controversy between this objecting respondent will be postponed until the question of whether the above involuntary proceedings will be dismissed or an adjudication entered, all as provided in the stipulation on file herein.

Dated this 23rd day of July, 1945.

COBB & UTLEY

By FRANCIS B. COBB

Attorneys for Respondent Charles Brown [81]

State of California,
County of Los Angeles—ss.

Charles Brown, being by me first duly sworn, deposes and says: That he is one of the Petitioners in the foregoing and above entitled action; that he has read the foregoing Petition for Review of Referee's Order and knows the contents thereof; and that same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

Charles Brown

Subscribed and Sworn to before me this 31st day of August, 1945.

[Notarial Seal]

Blanche Morris

Notary Public in and for said County and State.
My Commission Expires July 22, 1947.

[Endorsed: Filed Sep. 12, 1945. [82]]

[BANKRUPT'S EXHIBIT NO. 1]

Agreement made this 2nd day of June in the year one thousand nine hundred and thirty-one, by and between F. R. Cruickshank & Co. of the Pacific, a corporation duly incorporated under the laws of the State of California, hereinafter called the "Company," and Abbott-Kinney Co., a corporation duly incorporated under the laws of the State of California, hereinafter called the "Purchaser."

In Consideration of the covenants hereinafter contained, it is agreed as follows:

CLAUSE I

This contract shall bind the parties herein named and their successors and assigns.

CLAUSE II

Wherever, in this instrument the word "Assets" is used, it shall mean the existing buildings and the machinery and stock of merchandise therein, belonging to the Purchaser and located at: No. Pier Street Ocean Front (Office 68½ Windward Ave.) City of Los Angeles, Town of Venice, County of Los Angeles, State of California.

The purchaser warrants that it is the owner in fee of the assets and by lease and of the land whereon the same are situated, free and clear of all mortgages, encumbrances, liens, etc., except the following:

A bond indebtedness secured by trust indenture in the sum of \$350,000.00.

Real property located in the County of Los Angeles, State of California, more particularly described as follows:

Parcel 1: Lot "NN" of Venice of America, as per map recorded in Book 6, Pages 126 and 127 of Maps, Records of Los Angeles County, and that certain real property, all in the City of and County of Los Angeles, State of California, described as a whole as follows:—

Beginning at the most Easterly corner of Block 12 of County Club Tract, as per map recorded in Book 3, Page 76 of Maps, Records of said County; thence South 51° , $10'$, West, along the Southeasterly line of said Block 12 and the Southwesterly prolongation thereof, 199 feet, more or less to the Mean High Tide Line of the Pacific Ocean, as described in decree rendered July 31st, 1925, in Case No. 14056 Superior Court, entitled, "City of Venice, vs. Abbot Kinney Company at al." thence south 33° , $39'$, $30''$ East, along said Mean High Tide Line, 235.85 feet, more or less to the Southwesterly prolongation of the Southeasterly line of the above mentioned Lot "NN" thence North 51° , $10'$ East, along said last mentioned prolongation and Southeasterly line, 212 feet, more or less to the most Easterly corner of said Lot "NN"; thence North 36° , $49'$ West, along the Northeasterly line thereof 195.01 feet to the most Northerly corner of said Lot "NN"; thence North 36° , $49'$ West 40.02 feet, more or less, to the point of beginning.

Except the Northeasterly 20 feet thereof.

Also Except those portions thereof included within the lines of Market Street (formerly Zephyr Avenue), conveyed to the City of Ocean Park, by deed recorded in Book 4195, Page 124 of Deeds, Records of said County, more particularly described as follows: [83]

Beginning at a point which is South 51° , 12' West 40 feet distant from the most Southeasterly corner of Lot 5, Block "A," Venice of America Tract; thence South 51° , 12' West along the Northerly line of Cephyr Avenue, 353.10 feet; thence North 36° 47' West, along high tide line, 17.45 feet; thence North 53° 11' West, along a straight line, 332.85 feet; thence South 36° 47' East, along a line parallel to Ocean Front Walk, 5.93 feet to beginning.

Parcel 2: That portion of Lot "A" of Tract No. 898, as per map recorded in Book 16, Page 128 of Maps, in the office of the County Recorder of said County, bounded on the Northeast by the Northeasterly line of said Lot "A"; on the Southeast by the Southeasterly line of said Lot "A"; on the Southwest by the mean high tide line of the Pacific Ocean as established by decree rendered July 31st, 1925, in Case No. 140756, Superior Court, entitled "City of Venice, vs. Abbot-Kinney Company, et al." and on the Northwest by the Northwesterly line (and its prolongation Southwesterly) of Lot "MM", "Venice of America", as per map recorded in Book 6, Pages 126 and 127 of said Map Records.

Parcel 3: Those portions of Lots "B" and "C" of Tract No. 898, as per map recorded in Book 16, Page 128 of Maps, in the office of the County Recorder of said County, bounded on the Northeast by the Northeasterly lines of said Lots "B" and "C"; on the Southeast by the Southeasterly line of said Lot "C"; on the Southwest by the mean high tide line of the Pacific Ocean as established by decree rendered July 31st, 1925, in Case No. 140756, Superior Court, entitled: "City of Venice, vs. Abbot-

Kinney Company et al.” and on the Northwest by the Northwestern line of said Lot “B”.

Excepting therefrom that portion of said Lot “C” conveyed to the City of Venice, by deed recorded in Book 6781, Page 234 of Deeds.

Parcel 4: Property described in that certain lease dated January 14, 1921, between the city of Venice (now city of Los Angeles) and Abbot Kinney Company, which said lease is of record in the office of the County Recorder of Los Angeles County, and as described by a decree rendered July 31, 1925, Case No. 140756, Superior Court of Los Angeles County, entitled “City of Venice vs. Abbot Kinney Company et al.”

CLAUSE III

The Company agrees to procure insurance policies at its own expense in companies authorized by the Insurance Departments of the State of California and/or ————— insuring the Assets against fire for eleven years, beginning ten days after mailing of notice to the Purchaser by the Company for Four Hundred Thousand (400,000.00) Dollars, as follows:

Blanket

provided, however, that the Company in its discretion may at any time, by mailing written notice to the Purchaser at the address set forth herein, require the Purchaser to purchase its own insurance, and five days from date of mailing such notice the Company’s obligation to procure insurance policies or keep the same in effect shall terminate, and the Company shall thereupon allow on account of payments to be made under this contract the premiums

required to be paid by the Purchaser, but which premiums in no event shall exceed the promulgated tariff rates.

CLAUSE IV

The Company agrees that on about September 1, 1931, it will cause to be installed in the premises described in Clause II, a Wet pipe system of approved fire extinguishing apparatus, consisting of automatic [84] sprinklers, pipe, fittings, hangers, valves, etc., hereinafter referred to as a "Sprinkler Equipment," in accordance with plans to be approved by the Insurance Body having jurisdiction and to maintain the same at its own expense for the period of this contract, Provided, however, that the Purchaser shall (and the purchaser) at all times during the life of this agreement supply at its own expense:

1. Sufficient space on the premises for materials and proper facilities for the prosecution of the work of installing, repairing and maintaining the sprinkler equipment.
2. Water, Steam, Heat, Power and Air which may be required and necessary to keep the sprinkler equipment in proper working order.
3. And further agrees to protect said apparatus from injury or destruction, and assumes full responsibility for the stability of the building, and every part thereof, for the placing and maintenance of the tank, if any, and its contents upon said building.

And Provided Further, that the Company shall not be liable for delay in installing said sprinkler equipment no matter how caused, except delay caused by its wilful fault.

And Provided Further, that should said sprinkler equipment of the assets be destroyed, in whole or in part,

by any cause, or abandoned, in whole or in part, by the Purchaser for any reason, then all obligations of the Company to maintain or repair said equipment shall cease and terminate, with respect to the whole or any part thereof so destroyed or abandoned, without liability on the part of the Company to refund payments theretofore made or otherwise.

CLAUSE V

The Purchaser agrees to pay the Company the following sums of money on the following dates:

Nineteen Thousand Five Hundred (19,500.00) Dollars
upon installation of the sprinkler equipment and

Nineteen Thousand Five Hundred (19,500.00) Dollars
Sept. 1, 1932

Nineteen Thousand Five Hundred (19,500.00) Dollars
Sept. 1, 1933

Nineteen Thousand Five Hundred (19,500.00) Dollars
Sept. 1, 1934

Nineteen Thousand Five Hundred (19,500.00) Dollars
Sept. 1, 1935

Nineteen Thousand Five Hundred (19,500.00) Dollars
Sept. 1, 1936

Nineteen Thousand Five Hundred (19,500.00) Dollars
Sept. 1, 1937

Nineteen Thousand Five Hundred (19,500.00) Dollars
Sept. 1, 1938

Nineteen Thousand Five Hundred (19,500.00) Dollars
Sept. 1, 1939

Nineteen Thousand Five Hundred (19,500.00) Dollars
Sept. 1, 1940

Nineteen Thousand Five Hundred (19,500.00) Dollars
Sept. 1, 1941

The Purchaser may anticipate any or all of the above payments by deducting the amount of premiums to be paid for insurance not yet furnished at the published rate of the Board of Fire Underwriters of the Pacific, and discount the amount then due hereunder for all unpaid installments at the rate of seven (7) per cent per annum.

If the Purchaser fails to make any of the above payments on the date such payment is to be made, or otherwise fails to perform any term or condition hereof on its part to be performed, or makes any default hereunder, then, at the option of the Company, on thirty days notice in writing to the purchaser stating the default and demanding correction thereof, all payments then due or thereafter to become due hereunder shall forthwith become due and payable, and all the right, title and interest of the Purchaser in said equipment, or any other improvements placed upon the Assets or said land by the Company, shall at the option of the Company immediately cease, and the Company, with or without the aid of legal process, may at its option enter the Assets and [85] turn off the water from said equipment and remove the same and all improvements placed by the Company on the Assets or said land, whether or not attached to the realty, for which purpose said sprinkler equipment and improvements however attached shall at all times be deemed personal property severable from the realty without material injury to the freehold. The Company shall incur no liability in damages or otherwise for any act done in turning off said water, or in removing said equipment or improvements or any part thereof, or otherwise in the exercise of any right or privilege hereunder. If the Company removes said equipment or improvements, the Company may re-

tain all payments made by the Purchaser free and clear of any claim by the Purchaser. The Company, may at its option, if said equipment or improvements are retaken, sell the same or any part thereof, without previous demand on the Purchaser, and with or without notice, either at public or private sale, at which the Company may at its option purchase the same, and the Purchaser agrees to pay on demand any deficiency between the amount realized by such sale or sales of said equipment or improvements and any balance due or payable hereunder. The turning off of said water or retaking of said equipment and improvements shall be without prejudice to any other right reserved to the Company hereunder. The Company may at its option sue for and recover any payment or payments due hereunder without prejudice to its right to remove said equipment or improvements, or to any other right reserved to it hereunder.

During the life of this contract no discontinuance of ownership of the Assets by the Purchaser except as otherwise herein provided, shall terminate or affect the Purchaser's liability.

At the Company's option, the Purchaser shall be deemed to have made default hereunder if it be adjudicated a bankrupt or become insolvent, or if a receiver be appointed for it, or if it make a general assignment or trust for the benefit of creditors, or call a meeting of its creditors to ask any accommodation of them, or if a judgment be docketed against it and remain unsatisfied for a period of ten consecutive days, or if a lien in foreclosure of mechanics' lien, or other lien, be filed against the aforesaid Assets and remain a lien thereon for a period of ten consecutive days, or if an execution upon a judg-

ment be issued against the Purchaser and be returned unsatisfied.

CLAUSE VI

The Purchaser agrees to permit the Company by or with the aid of others, to enter the premises and to install therein and to change and repair at the Company's own expense, the sprinkler equipment and such other improvements as it may at any time desire to make. Should the work of installation be discontinued from any cause, not the fault of the Company, except by fire, there shall immediately be due and payable to the Company a sum equal to the full aggregate payments above stated, less an allowance for insurance, materials, labor and expenses not supplied or incurred.

CLAUSE VII

The title to said sprinkler equipment shall remain at all times in the Company until the Purchaser has duly performed all its obligations hereunder. The Company agrees that at the full termination of this contract and upon the faithful compliance by the Purchaser with the terms and conditions herein contained and the making of all the payments by it required to be made at the times fixed and specified for making the same, all improvements which the Company may place upon the premises and which then are in or upon said premises, shall become the sole property of the Purchaser and the Company shall make, execute, acknowledge and deliver at that time a proper bill of sale for the same to the Purchaser. [86]

CLAUSE VIII

The Purchaser hereby employs the Company to negotiate all insurance upon the Assets during the period of this

contract. Should more or less insurance than the amount specified in Clause III be required by the Purchaser, the cost thereof to the Company shall be credited or charged to the Purchaser at the published rates of the insurance Body having jurisdiction. Nothing herein contained shall be construed to make or constitute the Company an insurer of the Assets of the Purchaser. The Purchaser agrees to comply with all the terms and conditions affecting co-insurance and other warranties and conditions which may be contained or be inserted in any policy of insurance delivered to it by the Company and that the Company shall not be liable for breach of any warranties, terms or conditions in any of said policies contained.

CLAUSE IX

The Purchaser agrees that it will pay all taxes and assessments levied against the Assets and that it will not do nor permit to be done anything which will increase the rate of insurance upon the Assets and will comply with all rules of the Insurance Body having jurisdiction or any other body or public authority which has made or may hereafter make any rules or regulations as to the terms and conditions of policies or rates or the use and occupancy of the Assets and if such rate of insurance be increased, because of failure to comply with the foregoing requirements, the Purchaser will pay on demand the additional premium charged by reason of such increase. In the event that any addition or alteration is made in the Assets or new building is erected on the premises during the term of this contract such new building, addition and/or alteration shall be equipped with a sprinkler equipment at the expense of the Purchaser in accordance with plans to be approved by the Company.

The Purchaser at its own expense will make all changes, repairs and improvements on the premises and comply with all requirements which may be demanded by the Insurance Body having jurisdiction or any public body or local authority.

CLAUSE X

The company to furnish necessary automatic sprinklers to meet the requirements of the Board of Fire Underwriters of the Pacific.

The company to install the necessary bulkheads beneath the pier, also to run sprinkler lines both sides of these bulkheads.

The company to furnish and erect one-one hundred thousand gallon steel gravity tank on a steel tower, also to provide foundation for said gravity tank and make all connections necessary for sprinkler system.

The company to make the necessary connections to city water mains.

The company to revamp the present automatic fire pump which is at present connected to the swimming pool of the Venice Plunge so that this secondary supply of water may be thrown into the automatic sprinkler system if required.

The company to paint sprinkler system with two coats of paint, where piping is exposed to view to match decorative scheme, thereafter the purchaser to repaint sprinkler system when required during the life of this contract.

All work to be subject to the approval of the Board of Fire Underwriters of the Pacific and the Los Angeles Building Ordinance. [87]

Addenda to Clause III: If at any time the purchaser can buy the insurance to be furnished under this contract at a lower rate than promulgated by the insurance body having jurisdiction or the rate at which the policies in effect at that time are written, then in that event the company must furnish the insurance at renewal at the same cost as would be produced by the new rate obtained by the purchaser and credit the difference in cost to the future payments to be made under this contract, or the purchaser has the right to eliminate the furnishing of insurance by the company and buy its own insurance direct and receive credit for the cost of such insurance at the rate offered by the company.

Addenda (A) to Clause IV: In event of partial destruction of the assets and purchaser rebuilds same, company agrees to reconstruct at its own expense the wet pipe sprinkler system affecting the part rebuilt of approximately the same number of sprinkler heads as before destruction. The definition of total destruction of the assets is to mean such damage which cannot be repaired in six months. In the event of partial destruction of the assets and the purchaser determines not to rebuild, then the purchaser may settle its obligations hereunder by paying the company the sum provided for in Paragraph V, Section 2 hereof, less such sum of money as the company may collect from insurance carried by it on such sprinkler equipment. In this connection the company agrees to carry full insurance on said sprinkler equipment.

Addenda (B) to Clause IV: In the event of total destruction of said assets as herein defined then all obligations of the purchaser and company hereunder shall cease.

Addenda to Clause V: The first payment due under this contract can be made by allowing the company to collect the unearned premium due on the insurance in effect at the time of the company furnishing the contract insurance and the balance of the \$19,500.00 after receiving credit for such return premium may be paid at the rate of \$1950.00 on the 1st day of each month until the full amount of such balance of said first installment of \$19,500.00 is paid without interest.

The right is reserved to the Company to inspect the Assets at all reasonable time. No obligations other than herein expressly set forth shall be binding on the Company and no representations, verbal or otherwise, shall affect this contract if not contained herein. All changes in this contract shall be initialed by an officer of the Company.

This contract shall not be binding upon the Company until signed by an executive officer of the Company, and the seal of the Company affixed hereto at the Company's principal place of business in the City and County of San Francisco, State of California.

If the Purchaser is an individual, or if there is more than one Purchaser, all changes in the wording of this agreement necessary to meet such conditions shall be considered made. If there is more than one Purchaser, all Purchasers shall be liable hereunder jointly and severally.

In Witness Whereof this agreement has been duly executed, in triplicate, by the parties hereto, as witness, the

signatures of the duly authorized officers and the corporate seals thereof.

In Presence of:

(Corporate Seal) F. R. CRUICKSHANK & CO.
OF THE PACIFIC
By H. S. West
Vice Pres.

(Corporate Seal) ABBOTT-KINNEY CO.
By Sherwood Kinney
Pres.
By Edward A. Gerety Jr.
Asst. Secy. [88]

State of California .
County of Los Angeles—ss.

On this 2nd day of June, 1931, before me, Frances McCourt, a Notary Public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared H. S. West, known to me to be the Vice President of F. R. Cruickshank & Co. of the Pacific, the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the County of Los Angeles, State of California, on the day and year in this certificate first above written.

(Seal) Frances McCourt

Notary Public in and for the County of Los Angeles,
State of California.

State of California

County of Los Angeles—ss.

On this 2nd day of June, 1931, before me, Frances McCourt, a Notary Public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Sherwood Kinney, known to me to be the President of Abbot Kinney Co. and Edward A. Gerety, Jr., Ass't Secretary of Abbot Kinney Co., the corporation that executed the within instrument, and acknowledge to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the County of Los Angeles, State of California, on the day and year in this certificate first above written.

(Seal)

Frances McCourt

Notary Public in and for the County of Los Angeles,
State of California.

Recorded as instrument 1274 on June 6, 1931, in Book 10877 at Page 246 of Official Records of Los Angeles County, California. [89]

SUPPLEMENTAL AGREEMENT

This Supplemental Agreement, made and entered into as of the 29th day of December, 1937, by and between F. R. Cruikshank & Co., a corporation, hereinafter called "First Party," and Abbot-Kinney Company, a corporation, hereinafter called "Second Party,"

Witnesseth:

Whereas, on and as of the 2nd day of June, 1931 an agreement in writing was entered into by and between F. R. Cruikshank & Co., of the Pacific, a corporation, therein called "the Company," and Second Party, therein called "the Purchaser," which agreement provides for the installation by the Company of a wet pipe system of approved fire extinguishing apparatus, therein referred to as "sprinkler equipment," in and on certain property then and now owned by Second Party, located in the City of Los Angeles, County of Los Angeles, State of California, to which contract specific reference is hereby made; and

Whereas, on and as of the 10th day of August, 1931 said F. R. Cruikshank & Co. of the Pacific, a corporation, assigned to First Party its entire right, title, and interest in and to said agreement and all of its right, title, and interest in and to said sprinkler equipment, and by virtue thereof First Party is now, and since the 10th day of August, 1931 has been, the sole owner of all rights, privileges, and benefits of said F. B. Cruikshank & Co. of the Pacific in, under, and by virtue of said contract, and is now, and since the 10th day of August, 1931 has been, the sole owner of said sprinkler equipment; and [90]

Whereas, Second Party is now in default under the terms of said agreement to the extent of \$57,501.30 plus

accrued interest up to October 1, 1937 in the sum of \$8,374.56; and

Whereas, it is the desire of the parties hereto to cause said default of Second Party to be cured by the provisions hereof and to modify said contract in certain particulars;

Now, Therefore, it is hereby agreed:

1. First Party is hereby relieved of any obligation to procure any insurance policies insuring any of the assets of Second Party.

2. First Party hereby waives all accumulated interest on past due installments under the terms of said agreement; and hereby waives all existing defaults of Second Party under the terms of said agreement, but without prejudice to any rights it might have in the event Second Party become in default under said contract, as hereby modified, at any time hereafter.

3. It is hereby agreed that the unpaid balance of the sums required to be paid to First Party by Second Party under the terms of said agreement, exclusive of accumulated interest, waived as aforesaid, and after crediting insurance premiums which would have been paid by First Party but for the provisions of paragraph 1 hereof, totals One Hundred Thirty-seven Thousand One Hundred Eighty-one and 30/100 (\$137,181.30) Dollars, which sum Second Party agrees to pay in cash, lawful money of the United States, in installments as follows:

\$30,000.00 on December 8, 1938;
\$30,000.00 on December 8, 1939;
\$30,000.00 on December 8, 1940;
\$30,000.00 on December 8, 1941;
\$17,181.30 on December 8, 1942.

[Written in margin]: Notify to Put in Condition]

4. Second Party agrees to maintain the sprinkler [91] system mentioned and described in said contract in good order and condition at its own cost and expense until all sums required to be paid by Second Party to First Party under the terms of said contract, as hereby modified, shall have been paid in full; and in the event Second Party shall fail so to do after receiving thirty (30) days notice in writing from First Party, First Party shall have the option of accelerating the due date of all then unpaid installments under the terms of said contract, as hereby modified.

5. Notwithstanding anything herein of in said contract to the contrary, Second Party shall have the right to remove or otherwise dispose of not to exceed ten (10%) per cent of said sprinkler equipment at any time subsequent to payment of the \$30,000.00 installment due on December 8, 1938, as herein provided, and may remove or otherwise dispose of an additional ten (10%) per cent of said sprinkler equipment after each additional \$30,000.00 installment shall have been paid, as herein provided, provided such partial removal or disposition can and will be effected without damaging or diminishing the usefulness or value of the remainder of said sprinkler equipment.

6. In the event of any conflict between the provisions of said contract and this Supplemental Agreement the provisions of this Supplemental Agreement shall prevail; but, except as hereby expressly modified, said contract and the rights, benefits, and privileges of First Party as the assignee of F. R. Cruikshank & Co. of the Pacific, a corporation, are hereby reaffirmed and readopted.

In Witness Whereof, First Party causes this Supplemental Agreement to be executed by its President, duly authorized so to do, and Second Party causes this Supplemental Agreement to [92] be executed by its officers, duly authorized so to do, on the day and date first above noted.

F. R. CRUIKSHANK & CO.

By H. S. West

President

First Party

(Abbot-Kinney Company

Corporate Seal)

ABBOT-KINNEY COMPANY

By Sherwood Kinney

President

By Carleton Kinney

Secretary

Second Party [93]

The question of executing the Supplemental Agreement between F. R. Cruikshank & Co. and Abbot Kinney Company was then discussed. The supplemental agreement offered by F. R. Cruikshank & Co. was presented and upon motion duly made, seconded and unanimously passed, the following resolution was adopted:

Resolved: That the President and Secretary of the Company shall be and are hereby authorized and directed to execute said Supplemental Agreement with F. R. Cruikshank & Co. for and on behalf of Abbot Kinney Company.

I, Carleton Kinney, Secretary of Abbot Kinney Company, do hereby certify that the foregoing is a full, true and correct copy of a resolution duly passed at a special meeting of the Board of Directors held on December 23, 1937 at 526 Bank of America Building, Los Angeles, California, and that said resolution is still in full force and effect and has never been revoked.

(Corporate Seal)

CARLETON KINNEY

Secretary of Abbot Kinney Company, a California Corporation [94]

SECOND SUPPLEMENTAL AGREEMENT PARTIES

F. R. Cruikshank & Co., a corporation, referred to as "First Party,"

Abbot-Kinney Company, a corporation, referred to as "Second Party."

RECITALS

A. On and as of the 2nd day of June, 1931, an agreement in writing was entered into by and between F. R. Cruikshank & Co. of the Pacific, a corporation, therein called "the Company," and Second Party, therein called "the Purchaser," which agreement provides for the installation by the Company of a wet pipe system of approved fire extinguishing apparatus, therein referred to as "sprinkler equipment," in and on certain property then and now owned by Second Party, located in the City of

Los Angeles, County of Los Angeles, State of California, to which contract specific reference is hereby made.

B. On and as of the 10th day of August, 1931 said F. R. Cruikshank & Co. of the Pacific, a corporation, assigned to First Party its entire right, title, and interest in and to said agreement and all of its right, title, and interest in and to said sprinkler equipment, and by virtue thereof First Party is now, and since the 10th day of August, 1931 has been, the sole owner of all rights, privileges, and benefits of said F. R. Cruikshank & Co., of the Pacific in, under, and by virtue of said contract, and is now, and since the 10th day of August, 1931 has been, the sole owner of said *prinkler* equipment. [95]

C. On and as of the 29th day of December, 1937 the parties hereto entered into a Supplemental Agreement, modifying in certain particulars therein recited said agreement dated the 2nd day of June, 1931.

D. All payments provided to be made under said agreement dated the 2nd day of June 1931 as supplemented by said agreement dated the 29th day of December, 1937 are now past due, the Statute of Limitations on such payments is about to toll, and in order to avoid litigation the parties desire to enter into this agreement for the purpose of waiving the Statute of Limitations to the date hereof.

TERMS

1. Second Party acknowledges and agrees that it is indebted to First Party under said agreement dated the 2nd day of June, 1931 as supplemented by said Supple-

mental Agreement dated the 29th day of December, 1937 in the total sum of \$137,181.30 plus accrued interest.

2. Second Party waives the Statute of Limitations accrued to the date hereof against its obligation to First Party under said agreement dated the 2nd day of June, 1931 as supplemented by said Supplemental Agreement dated the 29th day of December, 1937.

3. First Party waives all accrued interest on Second Party's obligation to it under said agreement dated the 2nd day of June, 1931 as supplemented by said Supplemental Agreement dated the 29th day of December, 1937.

Executed in duplicate original on and as of the 14th day of January, 1943.

F. R. CRUIKSHANK & CO.

By H. S. West

President

First Party

(Corporate Seal)

ABBOT-KINNEY COMPANY

By Carleton Kinney

President

By W. Thos. Davis

Secretary

Second Party [96]

Re No. 43,551-O'C. Abbot-Kinney Co., Bankrupt.
Bankrupt's Exhibit No. 1. Filed July 24, 1945. Benno
M. Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [97]

[BANKRUPT'S EXHIBIT NO. 2]

AGREEMENT

Know All Men By These Presents:

The undersigned, F. R. Cruikshank & Co., a corporation organized and existing under the laws of the State of New York, for a valuable consideration, hereby sells, assigns, and transfers, without warranty, to Charles J. Brown, his heirs, executors, administrators, and assigns, the entire right, title, and interest of the undersigned in and to the following documents:

1. Agreement dated June 2, 1931 between F. R. Cruikshank & Co. of the Pacific, a California corporation, referred to as "Company", and Abbot Kinney Co., a California corporation, referred to as "Purchaser", recorded on June 6, 1931 in Book 10877 at page 246 of Official Records of Los Angeles County, California, which contract was assigned to the undersigned on August 10, 1931;
2. Supplemental Agreement dated December 29, 1937 between the undersigned and Abbot Kinney Company, supplementing and modifying in certain particulars contract No. 1; and
3. Second Supplemental Agreement dated January 14, 1943 between the undersigned and Abbot Kinney Company, supplementing and modifying in certain particulars contract No. 1.

This assignment is intended to and does vest in Charles J. Brown, his heirs, executors, administrators, and assigns, all rights of the undersigned in and to the documents described heretofore accrued, presently existing, and

any that may arise hereafter, but without warranty or representation by or on behalf of the undersigned, including the right to collect, sue for, and recover all funds now due or which hereafter may become due thereunder, all to the same extent and with the same rights, privileges, and powers that the undersigned would have but for this assignment. [98]

This assignment has been executed on March 4, 1944, but shall not be effective until the 13 day of June, 1944, which is the date of delivery hereof to the Assignee.

Executed in New York, New York, on March 4, 1944.

F. R. CRUIKSHANK & CO.

By H. S. WEST

president

By H. O. DORR

secretary [99]

State of New York

County of New York—ss:

On the 4th day of March, nineteen hundred and forty-four before me personally came H. S. West, to me known, who, being by me duly sworn did depose and say that he resides in Bronxville, N. Y., that he is the President of F. R. Cruikshank & Co., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by the order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Notary Public Seal

ELIZABETH E. OWENS

Notary Public

Re No. 43,551-O'C. Abbot-Kinney Co., Bankrupt.
Bankrupt's Exhibit No. 2. Filed July 24, 1945. Benno
M. Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [100]

[BANKRUPT'S EXHIBIT NO. 3]

ABBOT KINNEY COMPANY

Founders of Venice of America

11 Venice Pier ~~1619 Ocean Front~~

Venice, California

Venice, Calif., June 23, 1944

No. 558

90-766 Venice Branch 90-766

Security-First National Bank

of Los Angeles

Venice, Calif.

Pay Seven Thousand – five hundred & 00/100 * *
Dollars \$7,500.00

to the

Order Charles J. Brown

of

ABBOT KINNEY COMPANY

John Harrah

Carleton Kinney

[Stamped]: Paid 6-27-44

Charles J. Brown

[Stamped]: Paid 6-27-44

Re No. 43,551 O'C. Abbott-Kinney Co., Bankrupt.
Bankrupt's Exhibit No. 3. Filed July 24, 1945. Benno
M. Brink, Referee.

[Endorsed]: Filed. Sep. 12, 1945. [101]

[BANKRUPT'S EXHIBIT NO. 4]

Owners and Operators

Telephones

Venice Pier

Main Office 62122

Venice Plunge

Venice Plunge 61529

ABBOT KINNEY COMPANY

Founders of Venice of America

1619 Ocean Front

Venice, California

Nov 6th 1944

Abbot Kinney Co

Gentlemen,

By reason of the contention among interests in the company I insist that a definite arrangement be made regarding the sprinkler system.

I now offer to accept from you immediately a cash payment of \$30,000.00 for which I will give credit on the contract for \$50,000.00 upon the following conditions.

You do by this acceptance acknowledge that the balance then remaining unpaid is approximately \$80,000.00 which is [102]

2

now due and which you promise to pay.

I agree to not turn the water off from the system for a period of one year from this date, except that I may turn the water off at any time if the company is adjudged a bankrupt, or a receiver appointed for the company or for the property covered by the trust indenture or if any of the present directors are removed or if the executive committee is changed or its powers restricted.

I retain all my rights under the contract including the rights to bring suit now or at any future time for the balance unpaid.

Chas. J. Brown [103]

Accepted by,
Abbot Kinney Company,
By Carleton Kinney
president

Re No. 43,551 O'C. Abbott-Kinney Co., Bankrupt.
Bankrupt's Exhibit No. 4. Filed July 24, 1945. Benno
M. Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [104]

[BANKRUPT'S EXHIBIT NO. 5]

ABBOT KINNEY COMPANY
Founders of Venice of America
1619 Ocean Front
Venice, California

Venice, Calif., November 8, 1944

No. 739

90-766 Venice Branch 90-766

Security-First National Bank

of Los Angeles

Venice, Calif.

Pay Thirty Thousand & 00/100 * * * Dollars \$30,000.00
to the

Order Charles J. Brown

of

ABBOT KINNEY COMPANY
John Harrah
Carleton Kinney

[Stamped]: Paid 11-8-44

Charles J. Brown

[Stamped]: Paid 11-8-44

Re No. 43,551 O'C. Abbott-Kinney Co., Bankrupt.
Bankrupt's Exhibit No. 5. Filed July 24, 1945. Benno
M. Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [105]

[BANKRUPT'S EXHIBIT NO. 6]

[Crest]

HARRAH'S BINGO

242 N. Virginia

Reno, Nevada

November 30, 1944

Abbot Kinney Co.

11 Venice Pier

Venice, Calif.

Gentlemen:

On November 25, 1944 I purchased from Charles J. Brown a one-third interest in the Sprinkler System and contract, and when any payments are made, one-third of the amount should be paid to me.

Yours truly,

William F. Harrah

WFH:ma

WILLIAM F. HARRAH

Re No. 43,551 O'C. Abbott-Kinney Co., Bankrupt.
Bankrupt's Exhibit No. 6. Filed July 24, 1945. Benno
M. Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [106]

[BANKRUPT'S EXHIBIT NO. 7]

F. R. CRUIKSHANK & CO.
Automatic Sprinklers-Insurance
55 Liberty Street
New York, N. Y.

5

June 6th, 1944.

Abbott-Kinney Company,
Windward Avenue,
Venice, Los Angeles,
California.

Gentlemen:—

Referring to the Contract by and between F. R. Cruikshank and Co., of the Pacific and Abbott-Kinney Co., under date of June 2nd, 1931, covering the installation of automatic sprinkler equipment and other fire protection devices, which Contract was sold, assigned, transferred and conveyed to F. R. Cruikshank & Co., under date of August 10, 1931, and to the Supplemental Agreement of the above referred to Contract entered into between F. R. Cruikshank & Co., and Abbott-Kinney Co., under date of December 29, 1937, and also to Second Supplemental Agreement dated January 14, 1943, we beg to advise you that we hereby declare the Contract in Default and that all payments due thereunder amounting to One Hundred Thirty-Seven Thousand One Hundred Eighty-One Dollars and Thirty Cents (\$137,181.30) plus accrued interest, are past due and we hereby make demand upon you for full payment.

In accordance with Clause 5 of the Contract of June 2, 1931, you are receiving thirty days notice in writing

stating the default and demanding correction thereof, prior to our taking such action as turning off the water from the automatic sprinkler system and removing same, or such other action as we deem necessary to protect our interests.

This letter is your formal notice that in the event your default is not corrected and payment of \$137,181.30 plus accrued interest not made on or before July 10, 1944, we intend to proceed to turn off the water and prepare the system for removal and/or sale as we deem best. All proceeds from such sale will be credited against your indebtedness and you will be held liable for any deficiency.

Prior to turning off of the water, we will notify the underwriters association having jurisdiction in order that the insurance interests may have full knowledge that protection of the sprinkler system is being discontinued and we assume no liability for such discontinuance.

Very truly yours,

F. R. CRUIKSHANK & CO.,

H. V. Dorr

H. V. Dorr,

HSW:MAC

Secretary-Treasurer.

Re No. 43,551 O'C. Abbott-Kinney Co., Bankrupt.
Bankrupt's Exhibit No. 7. Filed July 24, 1945. Benno
M. Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [107]

[BANKRUPT'S EXHIBIT NO. 8]

BAMBU HUT

25 Windward Ave.

Venice, California

Phone 63415

No. 6118

Endorsement of Check by Payee

Acknowledges Payment in Full of

Account Itemized Below.

Description Amount

Sprinkler

Venice, Calif., Nov 25 1944

Pay to the Order of Chas. J. Brown

\$3000.00

Three Thousand Dollars

BAMBU HUT

By John Harrah

Venice Branch

Security-First National

Bank of Los Angeles

90-766 Windward & Trolleyway

12

Venice

[Stamped]: Paid 11-28-44

Chas. J. Brown

[Stamped]: Paid 11-28-44

Re No. 43,551-O'C. Abbott-Kinney Co., Bankrupt.
 Bankrupt's Exhibit No. 8. Filed July 25, 1945. Benno
 M. Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [108]


[BROWN'S EXHIBIT NO. 1]

SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES

Customer's Statement

[CHAS J. BROWN]

Figures in
this column
are for
Bank Book-
keeper's use
and are not
part of your
statement.

Old Balance	Checks	Checks	Checks	Deposits	New Balance
Balance Brought Forward 					
				May 2 '44	7,258.29 s
		1,112.68 —		May 3 '44	6,145.61 s
	9.60 —			May 3 '44	6,136.01 s
	18.00 —	300.00 —		May 5 '44	5,818.01 s
	110.01 —			May 6 '44	5,708.00 s
	10.00 —	57.70 —	33.60 —	817.86	
	200.00 —			1,584.60 May 9 '44	7,809.16 s
	52.64 —			May 10 '44	7,756.52 s
	5.00 —			May 12 '44	7,751.52 s
	423.62 —	217.20 —	51.92 —		
	260.87 —			May 13 '44	6,797.91 s
	20.00 —			905.00 May 15 '44	7,682.91 s

1.50 —			463.79	May 17 '44	8,145.20 s
423.28 —	146.62 —	5.14 —			
1,483.02 —	33.60 —			May 18 '44	6,053.54 s
100.00 —				May 19 '44	5,953.54 s
			159.88		
			1,025.00		
			349.38	May 22 '44	7,487.80 s
47.70 —	1.98 —		106.00		
			423.46	May 23 '44	7,967.58 s
22.50 —				May 24 '44	7,945.08 s
10.00 —	652.52 —			May 25 '44	7,282.56 s
100.00 —	152.51 —	15.00 —			
1.00 —				May 26 '44	7,014.05 s
			10.00	May 27 '44	7,024.05 s
.50			328.65	May 29 '44	7,352.20 s
140.07 —	10.00 —		100.00	May 31 '44	7,302.13 s
			359.12		
			102.80	Jun 1 '44	7,764.05 s
158.00 —	58.26 —			Jun 2 '44	7,547.79 s
5.00 —	600.19 —			Jun 3 '44	6,942.60 s
225.00 —				Jun 5 '44	6,717.60 s
490.00 —			277.50		
			1,305.93	Jun 6 '44	7,811.03 s

IMPORTANT — DEPOSITOR PLEASE NOTE

Please Reconcile Your Statement and Vouchers as Soon as Possible After Receiving. If No Error Is Reported Within Ten Days, This Account and Vouchers Will Be Considered Correct.

SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES

Customer's Statement

[CHAS J. BROWN]

Figures in
this column
are for
Bank Book-
keeper's use
and are not
part of your
statement.

Old Balance	Checks	Checks Balance	Checks Brought Forward	Deposits	New Balance
				Jun 6 '44	7,811.03 s
101.17 —	190.51 —	94.38 —		Jun 7 '44	7,424.97 s
10.00 —				200.00 Jun 9 '44	7,614.97 s
162.76 —	225.82 —	190.57 —		Jun 9 '44	7,035.82 s
100.00 —	22.75 —	5,000.00 —	1,618.56		
52.64 —				409.91 Jun 13 '44	3,888.90 s
80.00 —				Jun 14 '44	3,808.90 s
796.82 —				Jun 15 '44	3,012.08 s
189.38 —	100.00 —	10.00 —	195.00		
			890.00		
			210.00 Jun 16 '44		4,007.70 s

3.23 —				Jun 20 '44	4,004.47 s
137.31 —	100.00 —	374.63 —	86.00		
				105.00 Jun 21 '44	3,583.53 s
75.00 —				174.80	
				216.40 Jun 22 '44	3,899.73 s
				109.00 Jun 23 '44	4,008.73 s
10.00 —				Jun 24 '44	3,998.73 s
100.00 —				7,545.00 Jun 26 '44	11,443.73 s
1,547.14 —				1,396.12 Jun 27 '44	11,382.71 s
68.65 —	193.00 —	138.71 —	1.00		
				284.32 Jun 28 '44	11,267.67 s
10.00 —	10.29 —			109.63 Jun 29 '44	11,357.01 s

IMPORTANT — DEPOSITOR PLEASE NOTE

Please Reconcile Your Statement and Vouchers as Soon as Possible After Receiving. If No Error Is Reported Within Ten Days, This Account and Vouchers Will Be Considered Correct.

Re No. 43551-O'C. Abbot Kinney Co., Bankrupt.
Brown's Exhibit No. 1. Filed July 26, 1945. Benno M.
Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [109]

[BROWN'S EXHIBIT NO. 2]

[Crest]

SECURITY-FIRST NATIONAL BANK OF
LOS ANGELES

Savings Commercial Trust

Venice Branch

Windward & Trolleyway

Venice, California

July 25, 1945

Mr. Charles J. Brown

Venice, California

Dear Mr. Brown:

In reply to your request for information on cashier's checks purchased by you on June 13, 1944, No. 815902 in the amount of \$5000.00 and No. 815906 in the amount of \$6000.00. Both were made payable to H. S. West and endorsement reads H. S. West by H. Darling, attorney in fact. These checks were paid June 20, 1944. Cashier's check No. 815035 was purchased by you March 2, 1944, in the amount of \$3800.00 and was cashed by you June 5, 1944.

Our records show the following dates of entrances in your safe deposit box for the year 1944:

January 3, 1944

" 11 "

" 20 "

February 9 "

" 23 "

April	5	“
“	“	“
“	12	“
“	21	“
May	31	“
June	2	“
“	“	“
“	13	“
“	“	“
“	26	“
July	6	“
August	29	“
Sept.	14	“
“	19	“
Dec.	14	“
“	“	“

Yours very truly,

R. E. Cole

R. E. Cole

Assistant Manager

Re No. 43,551-O'C. Abbott-Kinney Co., Bankrupt.
Brown's Exhibit No. 2. Filed July 26, 1945. Benno M.
Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [110]

[BROWN'S EXHIBIT NO. 3]

3/2/44 19——

Received from

SECURITY-FIRST NATIONAL BANK OF
LOS ANGELES

Thirty five hundred and no/100 Dollars \$3500.00

(Written Amount Here)

Chas. J. Brown

.....
(Present Address—If Recently Changed)

Account No. C

For Teller's Use

\$.....

[Stamped]: Paid 3-4-44

Counter Receipt—Not Negotiable

This Receipt Is for Use Only at the Counter of the Bank
by the Drawer Personally

[Written]: BEW

[Stamped]: Paid 3-4-44

Re No. 43551 O'C. Abbott-Kinney Co., Bankrupt.
Brown's Exhibit No. 3. Filed July 26, 1945. Benno M.
Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [111]

[BROWN'S EXHIBIT NO. 4]

RECEIPT

The undersigned, Charles J. Brown, acknowledges receipt from Guthrie & Darling, attorneys for F. R. Cruikshank & Co., a New York corporation, of the following documents:

1. Executed duplicate original of agreement dated June 2, 1931 between Abbot-Kinney Company, a California corporation, and F. R. Cruikshank & Co. of the Pacific, a California corporation;
2. Executed original assignment of the above agreement from F. R. Cruikshank & Co. of the Pacific, a California corporation, to F. R. Cruikshank & Co., a New York corporation;
3. Executed original Supplemental Agreement dated December 29, 1937 between F. R. Cruikshank & Co. and Abbot-Kinney Company;
4. Executed original of Second Supplemental Agreement between F. R. Cruikshank & Co., and Abbot-Kinney Company; and
5. Executed original assignment from F. R. Cruikshank & Co. to the undersigned, Charles J. Brown, dated March 4, 1944 and effective as of June 13, 1944, assigning to the undersigned the right, title, and interest of F. R. Cruickshank & Co., without warranty, documents 1, 3, and 4 above listed.

Dated: June 13, 1944.

Charles J. Brown

The undersigned, Guthrie & Darling, acknowledge receipt from Charles J. Brown of the following cashiers checks, each dated June 13, 1944 and each to the order of H. S. West:

1. Drawn against Bank of America, International Office, Los Angeles, No. 201691 in the amount of \$1,500.00;
2. Drawn against the Venice Branch of Security-First National Bank of Los Angeles, Clearing House 90-766, No. 815906 in the sum of \$6,000.00;
3. Drawn against the Venice Branch of Security-First National Bank of Los Angeles, Clearing House 90-766, No. 815902 in the sum of \$5,000.00; and [112]
4. Drawn against Ocean Park Branch of Security-First National Bank of Los Angeles, Clearing House 90-333, No. 218883 in the sum of \$2,500.00;

representing the full consideration for the assignment listed in the above receipt and delivery of the documents above described.

Dated: June 13, 1944.

GUTHRIE & DARLING

By Hugh W. Darling

Re No. 43,551-O'C. Abbot Kinney Co., Bankrupt.
Brown's Exhibit No. 4. Filed July 26, 1945. Benno M.
Brink, Referee.

[Endorsed]: Filed Sep. 12, 1945. [113]

[BANKRUPT GERETY'S EXHIBIT NO. 1]

AGREEMENT

This Agreement, dated the 23rd day of December, 1937, by and between J. L. Williams, I. Edward Robbin and William Harrah, hereinafter referred to as the "Williams group", and Moses C. Davis, W. Thomas Davis and Alfred A. Newton, hereinafter referred to as the "Newton group",

Witnesseth:

Whereas, the Williams group owns \$196,000 par value Abbot Kinney Company 7% Sinking Fund Gold Bonds, which bonds are now in escrow with the California Trust Company; and,

Whereas, there are issued and outstanding in more than 95,000 shares of stock of Abbot Kinney Company of which the Newton group owns 47,000 shares and controls 9,000 shares thereof; and,

Whereas, the parties hereto have determined to pool said stock and bonds and to use the same and distribute the proceeds derived therefrom on the basis and in the manner hereinafter set forth;

Now, Therefore, in consideration of the premises and the covenants of the parties hereinafter contained,

It Is Hereby Agreed as Follows:

I.

That the Williams group shall forthwith deliver to the California Trust Company, as depositary, the above mentioned \$196,000 par value Abbot Kinney Company 7% Sinking Fund Gold Bonds, free and clear of any and all liens, encumbrance or assessments, and the Newton

group shall forthwith deliver to the California Trust Company, as such depositary, said 56,000 shares of stock of Abbot Kinney Company, free and clear of any and all liens, encumbrances or assessments.

II.

That said bonds and stock and any other bonds or stock of Abbot Kinney Company hereinafter acquired by the parties hereto and deposited with said depositary hereunder, and any moneys and/or property derived therefrom, shall be held by said California Trust Company, as depositary, subject to unanimous [114] written consent of the parties hereto and said depositary shall only be authorized to account in regard to said bonds and/or stock and/or moneys and/or property in the manner and to the extent set forth in said written instructions. That the Williams group and Newton group, and each of them, may each act through their designated agent, provided they advise the depositary in writing of the appointment of such an agent and the acts of any however so appointed shall be binding upon his premises until such time as said depositary shall be advised in writing to the contrary.

III.

That none of the parties hereto will purchase, either directly or indirectly, any additional bonds and/or stock of the Abbot Kinney Company without first obtaining the consent of all of the parties hereto to such purchase. That in the event of any such purchase, of stock and/or bonds of Abbot Kinney Company so purchased shall accrue to the benefit of the Williams and Newton groups and the stock and/or bonds so purchased shall be forthwith delivered to the California Trust Company, as depositary, subject to the above mentioned terms and conditions.

IV.

That none of the bonds of Abbot Kinney Company now owned or hereafter acquired by any of the parties hereto will be used in foreclosing the Abbot Kinney Trust Indenture securing said bonds prior to April 1st, 1941; provided, however, that in the event the Abbot Kinney Company shall fail to renew any lien hereafter placed upon the property affected by said bonds, by persons other than the parties hereto, whether by judgment or otherwise, within ninety (90) days after such lien becomes final, and said lien is for an amount in excess of \$1,000, or if said Abbot Kinney Company shall, before said 1st day of April 1941, be adjudicated an involuntary bankrupt by a court of competent jurisdiction or petition of promises other than the parties hereto, then the above mentioned bonds may be used to foreclose said Trust Indenture; provided, further, however, that in the event of any such foreclosure prior to April 1st 1941, all of the bonds then held by the parties hereto pursuant to the terms of this agreement, shall be used for the purchase of the assets of said trust to the extent necessary to actually purchasing the same and the property so purchased shall forthwith be deeded to a new corporation organized by the parties hereto, and as the stockholders of the Abbot Kinney Company at the time of such foreclosure, [115] (even though no parties to this agreement) shall receive the number of shares of stock in said new corporation necessary to maintain the respective interest each had in the assets of the Abbot Kinney Company just prior to such foreclosure. That it is the declared policy of all other parties hereto to liquidate the present indebtedness of Abbot Kinney Company through sale of assets of said Abbot Kinney Company, if such is possible, there be no

foreclosure of the Trust Indenture. That all of the parties hereto shall and by these persons do hereby consent to the amendment to the Abbot Kinney Company Trust Indenture in the form which has now been approved by the Corporation Commissioner of the State of California and all of said parties and forthwith instruct the California Trust Company, as Trustee under the Abbot Kinney Company Trust Indenture, and shall discontinue any foreclosure proceedings or other action, heretofore commenced by the Williams group through Wm. G. Bonelli.

V.

That all parties hereto will use their best efforts to cause the said Abbot Kinney Company in the most expedient manner consistent with good business practice, to dispose of sufficient assets of said Abbot Kinney Company to liquidate its entire bonds indebtedness at the earliest possible date.

VI.

That all of the parties hereto consent to, and the Directors hired by the Williams and Newton groups shall vote for the execution of a supplemental agreement between Abbot Kinney Company and F. R. Cruikshank Co., hereby the indebtedness of approximately \$137,000 owing due for the F. R. Cruikshank Company from said Abbot Kinney Company, payable as follows: \$30,000 on or before December 8th, 1938 and the sum of \$30,000 on or before December 8th of each year thereafter until the full indebtedness due said F. R. Cruikshank Co. has been paid, said indebtedness not to bear interest and Abbot Kinney Company not to be entitled to any rebate for prepayment of principal. That until such an agreement with F. R. Cruikshank Co. had actually been entered into by

Abbot Kinney Company, the terms of this agreement shall have due force and effect. In the event the agreement, principal F. R. Cruikshank Co., and Abbot Kinney Company, is not actually executed within thirty (30) days from the date hereof, the Williams group may at their option forthwith terminate this agreement and [116] *and* upon such termination the parties hereto shall be relegated to the same position in which they were prior to the execution of this agreement.

VII.

That the Williams group shall forthwith return to H. S. West the sum of \$11,000 heretofore advanced by him to said Newton group (\$10,000 of which was delivered to the Williams group by Moses C. Davis). The obligations incurred by the Newton group to pay to H. S. West \$12,500 shall be met out of the first moneys derived from the above mentioned bonds, or any of them.

VIII.

That the Williams group shall forthwith advance the sum of \$6,250 to the Newton group to take care of obligations incurred by the Newton group to persons other than H. S. West.

IX.

That the Williams group will hold the Newton group harmless from any claims of Louis and/or George Kaufman, in a sum not exceeding \$9,000 arising from, or in any way connected with the attempted purchase of bonds by Moses C. Davis from Wm. G. Bonelli, which bond purchase deal is now in escrow with the California Trust Company.

X.

That out of the moneys received from the sale, and/or other disposal of and/or accrual to the above mentioned bonds or any bonds hereafter acquired by the parties hereto, the following sums will be paid and in the following order: to-wit;

- (a) the sum of \$12,500 to H. W. West;
- (b) Reimbursement to the Williams group of \$6,250 advanced to the Newton group hereunder and of all sums of money, of any paid by the Williams group to Louis Kaufman and/or George Kaufman, pursuant to the terms of this agreement, and of \$11,000 paid to H. S. West;
- (c) Payment to the Williams group of \$142,100;
- (d) Payment of any of the parties hereto of any moneys hereafter expended by them in purchasing any additional bonds of Abbot Kinney Company;
- (e) Payment to the Newton group of \$56,000;
- (f) The remaining money shall be paid one-half to the Williams group and one-half to the Newton group. [117]

XI.

That out of the moneys received from the sale and/or ordered disposal of and/or accrual to the above mentioned stock or of any additional Abbot Kinney Company stock hereafter acquired by the parties hereto, by dividends or through liquidation, or otherwise, the following sums of money will be paid in the following order, to-wit:

- (a) Payment to the Newton group of the difference between the amount they have theretofore received pursuant to Paragraph X, Subd (e) above and the sum of \$112,000;

- (b) Payment to any of the parties hereto of any moneys hereafter expended by them in purchasing any additional stock of Abbot Kinney Company;
- (c) The remaining moneys shall be paid one-half to the Williams group and one-half to the Newton group.

XII.

That Moses C. Davis hereby declares that he holds the agreement between himself and the Abbot Kinney Company dated the 15th day of October, 1937, for the purchase of certain properties of Abbot Kinney Company, in trust for all of the parties hereto. That Moses C. Davis shall use so many of the above mentioned \$196,000 of bonds as are necessary to consummate the pending sales of Abbot Kinney Company property to the City and/or county of Los Angeles and any money so received by Moses C. Davis from such transaction shall be delivered through the escrow opened to consummate such sale, to the California Trust Company, as such depository, and the escrow instruction shall so provide, and said money so deposited with such depository in the manner hereinabove provided.

XIII.

That in all actions of the Board of Directors of Abbot Kinney Company, the Williams and Newton groups shall each have the right to elect not less than two of such Directors. That immediately on the execution of this agreement, there shall be elected to the Board of Directors of Abbot Kinney Company, two members nominated by the Williams group.

XIV.

That in the event any dispute arises between the parties hereto under this agreement (including but not limited to a dispute as to the instructions that are to be given to the depositary and/or the voting trustee) of the Newton [118] and Williams groups shall each appoint one arbitrator and the two arbitrators so appointed shall then appoint a third and the three arbitrators so appointed shall settle the difficulty existing between the two groups and the decision so reached by said three arbitrators shall be binding upon all of the parties hereto.

XV.

That the voting Trust Agreement for the \$56,000 shares of stock which above tentatively entered into between W. Thomas Davis, Alfred A. Newton and Sherwood Kinney, shall be actually consummated, after obtaining a permit from the Corporation Commissioner of the State of California and the corporation of such consummation shall be divided equally between the Williams and Newton groups. Said voting Trust Agreement shall be amended, however, to provide that the Williams group shall at all times be entitled to appoint one trustee, the Newton group shall be entitled to appoint one and Sherwood Kinney shall be entitled to appoint one, and that said three trustees so appointed shall only vote in the manner there pursuant to the unanimous writing instruction of the parties hereto. That as the sum of \$112,000, as provided for in Paragraph XI, subd. (a) hereof above paid to the Newton group, voting trust certificates representing 28,000 share of stock of Abbot Kinney Company shall be transferred to the Williams group and a similare amount shall be transferred to the Newton group and that shall thereafter be the respective *owns* thereof.

XVI.

That the Williams group and the Newton group, and each of them do hereby release and discharge the other from any claim or claims, cause or causes of action, right, or damages which either has or claim to have against the other as a result of, or in any way arising out of the above mentioned bond purchase agreement between Moses C. Davis and William G. Bonelli and/or any attempted sale of property to the City or County of Los Angeles and will accept the rescission of the above mentioned bond purchase agreement heretofore served upon Moses C. Davis by the Williams group.

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above mentioned. [119]

I. EDWARD ROBBIN

(Signed)

I. Edward Robbin

WILLIAM HARRAH

(Signed)

William Harrah

I. EDWARD ROBBIN

(Signed)

By L. M. Halper (Signed)

WILLIAM HARRAH

(Signed)

By John Harrah (Signed)

W. THOS. DAVIS

(Signed)

W. Thos. Davis

ALFRED A. NEWTON

(Signed)

Alfred A. Newton.

Moses C. Davis (Signed)

By M. Philip Davis

(Signed)

Re No. 43551-O'C. Abbot Kinney Co., Bankrupt.
Gerety's Exhibit No. 1. Filed July 25, 1945. Benno
M. Brink, Referee.

[Endorsed]: Filed Aug. 31, 1945 at min. past 4
o'clock P. M. Benno M. Brink, Referee; Florence Robin-
son, Clerk.

[Endorsed]: Filed Sep. 12, 1945. [120]

[Title of District Court and Cause.]

PETITION IN INTERVENTION IN OPPOSITION
TO AMEND INVOLUNTARY PETITION ON
FILE HEREIN

To the Honorable Hugh L. Dickson, Referee in Bankruptcy:

The verified petition in intervention of Harold B. Pool, a creditor herein, and John Harrah, director, and Carleton Kinney, stockholder, respectfully shows:

I.

That on or about the 2nd day of October, 1944, a petition in involuntary bankruptcy was filed against Abbot Kinney Company, a California corporation, and thereafter on the 28th day of February, 1945, a creditors' first amended involuntary petition was filed and as to which petition the alleged bankrupt, Abbot Kinney Company, a California corporation, through its attorneys of record, Grainger & Hunt, filed an answer. That hearing on said petition and answer has been set for July 25, 1945, before the Honorable Hugh L. Dickson as Referee in Bankruptcy. [121]

II.

That your petitioner Harold B. Pool is a creditor of said alleged bankrupt and has a provable general unsecured claim fixed as to liability and liquidated as to amount, which claim arose by reason of legal services furnished to the alleged bankrupt within two years last past, that the reasonable value of said services was and is the sum of \$579.50, no part of which has been paid and the entire sum remains now due, owing and unpaid.

III.

That petitioner Carleton Kinney is the owner and holder of 9,300 shares of the capital stock of the alleged bankrupt.

IV.

That John Harrah is a director of the alleged bankrupt and that the Board of Directors consist of six members composed of your petitioner and Al Newton, M. P. Davis, W. Thomas Davis, M. W. Young and Lewis Helper. That W. Thomas Davis is the president and M. P. Davis is a brother of W. Thomas Davis and is the secretary. That said last two named parties are attorneys at law. That the involuntary petition in bankruptcy and the amended petition was filed by three petitioning creditors who are represented by Nicholas & Davis, a law firm in which M. P. Davis, secretary of the alleged bankrupt, is a partner.

V.

That your petitioners are informed and believe and upon said information and belief allege that M. P. Davis recommended to said corporation the employment of the firm of Grainger & Hunt as attorneys for the corporation and has conferred with them in respect to said matter and is working with said attorneys so that the alleged bankrupt has no independent disinterested counsel or officer or representative to present legal and equitable defenses to the above entitled proceeding. [122]

VI.

That your petitioner alleges that the above entitled proceeding should be dismissed on the ground and for the reason that said amended involuntary petition does not

state facts sufficient to constitute an act of bankruptcy or on which an order of adjudication can be entered for the following reasons:

1. That on the 23rd day of June, 1944, when the alleged act of bankruptcy was alleged to have been committed, said petition does not allege nor is it shown therefrom that there existed any other unsecured creditors of the same class as the said Charles Brown, E. A. Gerety, William Harrah and John Harrah or either of them. That petitioner is informed and believes and upon information and belief alleges that said company had no other creditors at said time other than creditors whose claims were secured and that the security possessed by said secured creditors was in excess of the value of their claims against the alleged bankrupt.

2. That said involuntary petition shows upon its face that the petitioning creditors did not have unsecured claims against the Abbot Kinney Company and that their claims are not fixed as to liability or liquidated in amount, since the petition shows that they are holders of bonds issued by the Abbot Kinney Company and that said trust indenture securing said first mortgage bonds has not been foreclosed and said parties are not creditors entitled to file a voluntary petition under the Bankruptcy Act as amended.

VII.

That the answer of the alleged bankrupt does not set up the defenses hereinabove alleged and your petitioners are advised that said defenses will not be set up even though the Board of Directors of the Abbot Kinney Company did by resolution authorize the employment of coun-

sel to defend the corporation against said involuntary petition. That the corporate offices are held and the corporation's affairs are being exercised by the said W. Thomas Davis [123] M. P. Davis and that demands have been made on the attorney for the Company to assert the defenses above alleged, but said demands have not been complied with.

VIII.

That petitioners desire to intervene and that your intervening petitioners in defense of said first amended involuntary petition do hereby admit, deny, allege and plead defenses in respect thereto as follows:

IX.

1. That the Abbot Kinney Company, a California corporation is not insolvent in that it possesses assets in excess of its liabilities and that your petitioner is informed and believes and upon information and belief alleges that any claim that might be asserted by the trustee under said trust indenture and note in respect to bond issue dated and issued on or about the 1st day of April, 1931, is barred by the Statute of Limitations and the law of the State of California, to-wit, Section 337, subdivision 1, Code of Civil Procedure.

2. The reasonable market value of the alleged bankrupt's property is the sum of \$400,000.00. That the alleged bankrupt's obligations other than said bond indenture on which \$269,000.00 in bonds is outstanding, do not exceed the sum of \$80,000.00. That said other obligations except for current claims are secured by security in excess of the reasonable market value of the obligation.

X.

That the trust indenture securing said bonds provides on page 65, Section 1, Article 11:

“All rights of action on or because of the bonds issued hereunder or the interest coupons thereto appertaining and all rights of action under this indenture are hereby expressly declared to be vested exclusively in the Trustee, except only as hereinafter provided; and such [124] rights may be enforced by the Trustee without the possession of any of the bonds issued hereunder or the interest coupons thereto appertaining. Any suit or proceeding instituted by the Trustee shall be brought in its name as Trustee, and any recovery or judgment shall be for the pro rata benefit of the bonds issued hereunder and the interest coupons thereto appertaining. Section 2. Any requesting direction, resolution or other instrument required by this indenture to be signed and executed by bondholders may be in any number of concurrent writings of similar tenor, and may be signed or executed by such bondholders in person or by attorney or agent appointed in writing. Proof of the execution of any such request, direction, resolution of other instrument, or of the writing appointing any such attorney or agent, and of the ownership of bonds, if made in the following manner, shall be sufficient for any purposes of this indenture and shall be conclusive in favor of the Trustee with regard to due action taken by it under such request.

Section 3. No holder of any bond or coupon secured hereby shall have the right to institute any

suit, action or proceeding at law or in equity, upon or in respect of this indenture or for the execution of any trust or power hereof or for the appointment of a receiver or for any other remedy under or upon this indenture, unless such holder shall previously have given to the Trustee written notice of an event of default, and unless also the holders of Twenty-five (25%) percent in amount of the bonds secured thereby then outstanding shall have made written request [125] upon the Trustee and shall have afforded to it a reasonable opportunity either to proceed itself to exercise the power hereinbefore granted, nor to institute such action, suit or proceeding in itself or may, and unless also such holders shall have offered to the Trustee reasonable security and indemnity against costs, expenses and liabilities to be incurred in or by reason of such action, suit or proceeding; and the Trustee shall have refused or neglected to comply with such request within a reasonable time thereafter. Such modification, request and offer of indemnity are hereby declared in every such case at the option of the Trustee to be conditions precedent to the execution of the actions and trusts of this indenture and to any action or cause of action for foreclosure or for any other remedy hereunder. It is understood, intended and hereby provided that no one or more holders of bonds or coupons shall have any right in any manner whatever to affect, disturb or prejudice the lien of this indenture by his or their action, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings hereunder shall be instituted, had and

maintained in the manner herein provided for the equal benefit of all holders of such outstanding bonds and coupons."

That the California Trust Company is the acting trustee of said bond indenture. That petitioner is informed and believes and upon information and belief alleges that a demand has been made by the holders of the bonds upon said trustee to take action in respect to foreclosing said indenture or enforcing the payment thereof. [126]

XI.

Further answering the first amended involuntary petition your petitioner alleges that the three petitioning creditors, to-wit: Frank Williams, Moses C. Davis and Charles W. Cradick are not creditors of said Abbot Kinney Company but merely hold bonds under said trust indenture and that all rights to take any action against the alleged bankrupt is vested in the California Trust Company and that said petitioning creditors nor do any of them have as alleged in paragraph 4 of their petition or otherwise, a provable general unsecured claim against Abbot Kinney Company and do not have claims fixed as to liability or liquidated as to amount and further deny that the aggregate amount of said petitioning creditors claims that are provable against the above entitled estate are in excess of \$500.00 but allege that said petitioning creditors have no provable unsecured claims in any amount whatever.

XII.

That your petitioners in answer to paragraph 5 of the creditors' first amended involuntary petition admits that on or about the 1st day of April, 1931, the Abbot Kinney

Company executed a trust indenture and issued bonds thereunder in the amount as alleged in said paragraph 5 but deny that there is any obligation existing on behalf of Abbot Kinney Company to the holders of said bonds for the reason that said obligations created by said bond indenture have become barred by the Statute of Limitations, Section 337, subdivision 1, Code of Civil Procedure. Further answering said paragraph 5, these intervenors deny that the assets of Abbot Kinney Company have a value of less than \$100,000.00 than the total amount due on principal and interest to the holders of said bonds under the trustee of said trust indenture but alleges the true facts to be that the assets of said company to be in excess of \$400,000.00 and that said obligations to the holders of said bonds and to the trustee of said indenture is barred by the Statute of Limitations as hereinabove alleged. [127]

XIII.

Further answering paragraph 6 of creditors' first amended involuntary petition, your intervenors deny that the payment made on June 23, 1944, of \$7500.00 constituted a preference or that said payment preferred said Charles Brown, Ed Gerety, William Harrah and John Harrah or either of them over the other creditors of said Abbot Kinney Company. Further alleges the true facts to be that said \$7500.00 was paid only to Charles Brown and Ed Gerety, that at the time of said payment there were no creditors in the same class as the parties receiving the said payment and that no preference was committed or was there any intent to prefer said parties receiving said \$7500.00 over other creditors of the alleged bankrupt in the same class as the parties receiving said

payment. That said payment was made in the ordinary course of business for a good and valuable consideration.

Wherefore your petitioner prays that the above entitled proceeding be dismissed and that your petitioner be given such further relief as is just and proper in the premises.

HAROLD B. POOL

CARLETON KINNEY

JOHN HARRAH

Intervenors [128]

[Verified.]

Received Jul. 18, 1945. Nicholas & Davis, GBA. [129]

Received copy of within this 18 day of July, 1945.
Grainger & Hunt, Attorney for Alleged Bankrupt.

[Endorsed]: Filed Jul. 19, 1945 at min. past 9
o'clock A. M. Hugh L. Dickson, Referee.

[Endorsed]: Filed Sep. 12, 1945. [130]

[Title of District Court and Cause.]

NOTICE OF MOTION ON PETITION TO
INTERVENE

To: Abbot Kinney Company, a California corporation,
alleged bankrupt and its attorneys of record, Grain-
ger & Hunt, and to the petitioning creditors and
their attorneys of record, Nicholas & Davis

You and each of you will please take notice that on
Monday, July 23, 1945, at the hour of 10 o'clock A. M.,
before the Honorable Hugh L. Dickson, Referee in Bank-

ruptcy, Room 339 Federal Building, Temple & Spring Streets, Los Angeles, California, Harold B. Pool, a creditor herein, and John Harrah, director, and Carleton Kinney, will make a motion through their attorneys of record, Cobb & Utley, to intervene in the above entitled proceeding and to oppose the amended involuntary petition in bankruptcy.

You are further notified that said motion will be made upon the files and records of the proceeding herein and upon the affidavit of Harold B. Pool and upon the petition in intervention, [131] a copy of which is being served with this notice of motion.

You are further notified that said motion will be made upon the points and authorities attached hereto and upon the ground that the jurisdiction of the above entitled court is sought to be invoked by petition of three bondholders who are not creditors and who do not have provable claims and upon the further ground that the corporation is dominated and controlled by the attorneys for the petitioning creditors and said defenses cannot be invoked on behalf of said corporation and that the attorneys for said corporation have refused to set forth said defenses on behalf of said corporation.

COBB & UTLEY

By Francis B. Cobb

Received Jul. 18, 1945. Nicholas & Davis, GBA.

Received copy of within this 18 day of July, 1945. Grainger & Hunt, by A. O. C., Attorneys for Alleged Bankrupt.

[Endorsed]: Filed Jul. 19, 1945 at min. past 9 o'clock A. M. Hugh L. Dickson, Referee.

[Endorsed]: Filed Sep. 12, 1945. [133]

[Title of District Court and Cause.]

AMENDED ANSWER OF ALLEGED BANKRUPT

To the Honorable J. F. T. O'Connor, Judge of the District Court of the United States, for the Southern District of California:

A petition having been filed in the above entitled Court on the 21st day of October, 1944, praying that your respondent, the alleged bankrupt above named, be adjudged a bankrupt, a First Amended Petition having been filed herein thereafter on the 21st day of February, 1944, and an answer to the first amended petition having been filed, and by stipulation of the parties and order of the Court your respondent having been permitted to file its amended answer to said first amended petition, your respondent now appears and answers the said amended petition as follows:

I.

Respondent admits the allegations contained in Paragraphs 1 and 2 of said first amended involuntary petition. [134]

II.

Respondent denies each and every allegation contained in Paragraph 3 of said First Amended Involuntary Petition, except that it admits it is not a wage earner or a farmer.

III.

Respondent denies each and every allegation contained in Paragraph IV of the said First Amended Involuntary Petition, except that it admits that each of the petitioning creditors is the owner and holder of certain bonds issued by the alleged bankrupt corporation pursuant to permit of the Commissioner of Corporations, and which said bonds are among bonds issued or held by the public.

IV.

Respondent denies each and every allegation contained in Paragraph 5 of said amended involuntary petition, except that it admits that on the 1st day of April, 1931, Abbott-Kinney Company issued its trust indenture securing an authorized issue of \$350,000.00 First Mortgage 7% Sinking Fund Gold Bonds, and there is presently outstanding and unpaid \$269,000.00 principal amount of said bonds.

Respondent further admits that the alleged bankrupt also owes taxes which are liens against the property securing the said bonds in a sum in excess of \$75,000.00.

Respondent further admits that the petitioners own certain of the bonds aforesaid, but is without information or belief as to the total amount owned by said individuals, and its denial of the amount of the bonds owned by them is based on that ground.

In respect to said alleged indebtedness of said petitioning creditors, respondent alleges that any alleged indebtedness owing to said petitioners, or any of them, is barred

by the sections of the Code of Civil Procedure of the State of California pertaining to limitations prescribed for the commencement of actions, and particularly is barred by the provisions of Subdivisions 1 and 2 of Section [135] 336-A of the said Code of Civil Procedure of the State of California.

V.

Respondent admits that the sum of \$7500.00 was paid to Charles Brown, but denies each and all of the other allegations of Paragraph 6 of said first amended involuntary petition.

Wherefore, said Abbott Kinney Company, the alleged bankrupt, prays that it should not be adjudged bankrupt for any cause in said first amended petition alleged, and prays a hearing thereon and that the petition herein be dismissed with costs.

ABBOTT KINNEY COMPANY

By W. Thos. Davis

President

GRAINGER AND HUNT

By K. Z. Grainger

Attorney for Alleged Bankrupt —[136]

[Verified.]

[Endorsed]: Filed Jul. 20, 1945 at min. past 10 o'clock A. M. Hugh L. Dickson, Referee.

[Endorsed]: Filed Sep. 12, 1945. [137]

[Title of District Court and Cause.]

[ORDER]

This is a review of the order made and entered by Referee Benno M. Brink, dated August 23, 1945.

The matter will be held under submission and in abeyance until there is filed with the court findings and report of the referee in bankruptcy, Benno M. Brink, as special master. When the court is in possession of these facts, the issues involved in the voluntary petition in bankruptcy and the answer thereto, the court will be in a better position to act.

The files show clearly that the petitioning creditors and alleged bankrupt have stipulated under date of January 8, 1945 that the said issues would be prosecuted with due diligence. The court made an order wherein the issues presented by the involuntary petition and the answer were referred to Benno M. Brink, referee, for hearing and report as special master, on July 24, 1945. The court is not advised the cause of this long delay. The attention of the special master is called to Rule 53 D (1) of Federal Rules of Civil Procedure: "It is the duty of the Master to proceed with all reasonable diligence".

It Is Therefore Ordered that the said special master proceed with the hearing of said controversy heretofore referred to him by order dated July 24, 1945.

Dated December 14, 1945.

J. F. T. O'CONNOR

Judge

[Endorsed]: Filed Dec. 14, 1945. [138]

[Title of District Court and Cause.]

MOTION FOR DISMISSAL AND NOTICE OF
HEARING THEREON

To the Above Named Alleged Bankrupt and Its Attorneys of Record, Grainger & Hunt; and to the Petitioning Creditors and Their Attorneys of Record, Nicholas & Davis:

You and Each of You Will Please Take Notice, that Harold B. Pool will, on March 11, 1946, at the hour of 10 o'clock A. M. or as soon thereafter as counsel may be heard, make a motion before the Honorable J. F. T. O'Connor, Judge of the above entitled Court in the Federal Bldg. Los Angeles, California, to dismiss the above entitled proceedings and all proceedings pending before any Special Master or Referee in Bankruptcy, and for an order revoking all references in respect to the above entitled proceedings; said motion will be made upon the ground,

I

That the above entitled Court has no jurisdiction of the above entitled proceeding in that no creditor entitled to file an involuntary petition in bankruptcy against the above named alleged bankrupt has signed the amended involuntary petition in bankruptcy or has joined therein.
[139]

II

That the amended involuntary petition in bankruptcy does not state facts sufficient to institute an act of bankruptcy.

III

That an order of this Court made on December 14, 1945 has been ignored and violated.

IV

That the petitioning creditors and their attorneys have been guilty of laches.

You Are Further Notified that said motion will be made upon the files and records of the proceeding herein and upon the affidavit of Harold B. Pool, a creditor, and upon the points and authorities attached hereto.

COBB & UTLEY

By Francis B. Cobb [140]

POINTS AND AUTHORITIES

Section 59a of the Bankruptcy Act, Central Illinois v. Flori Pipe Co., 133 Fed. (2d) 657, 660, is as follows:

“Since the amendment of 1938, it is doubtful if a single creditor whose claim is secured, even though the debt greatly exceeds the security, may qualify as one who can file an involuntary petition in bankruptcy without giving up his security. The Act, 11 U. S. C. A. sec. 95, requires that petitioner’s claim be ‘fixed as to liability and liquidated as to amount.’ Inasmuch as a secured creditor has a petitioning claim only for the difference between the amount of the debt and the value of the security, his claim is not liquidated. He therefore must fail to measure up to the qualifications of a petitioning creditor in an involuntary petition unless he waive his security.”

See Remington, Section 254, 1944 Supplement, page 104.

The Involuntary Petition Does Not State an Act of Bankruptcy.

It is alleged in paragraph 6 of the amended petition that the alleged bankrupt paid out of its assets to Charles Brown et al, "the sum of \$7,500.00 on an antecedent debt due them by Abbot Kinney Company, which payment was made for the purpose and with the intent of preferring said Charles Brown, et al., over the other creditors of said Abbot Kinney Company."

This allegation is insufficient to constitute an act of bankruptcy in that it does not allege or show that the parties receiving the payment were unsecured creditors or that they were in the same class as the petitioning creditors or that there were any other creditors in the same class as the parties receiving the payment.

If Charles Brown had a valid mortgage or conditional sales contract and payment could be made to him as alleged in the petition, [141] the same would not constitute a voidable preference.

Remington, Vol. 5, Sec. 2289, states:

"Each element of the preference must be alleged and proved."

Remington, Vol 4A, Sec. 1701, discussing the fourth element, states the rule:

"Who Are Creditors of the Same Class. It was ruled in an early case of the eighth circuit which

has been universally followed that the classes referred to are the classes in which creditors are grouped by Sec. 64, 11 USCA Sec. 104, for the purpose of priority in distribution.

In *re* Star Spring Bed Co., 257 F 176, 43 ABR 328 (1919; CCA NJ), (affirmed in 265 F 133, 45 ABR 650), Davis, District Judge: "The referee further states that

'A point not argued, but appearing to me to be decisive of this case, is that one essential element of a voidable preferential transfer is entirely lacking that is, the effect of the transfer must be to enable the creditor to obtain a greater percentage of his debt than other creditors of the same class. . . . Here, however, is a creditor holding security who surrenders it and receives other security. What creditors 'of the same class' are there over whom he has acquired a preference? There is no proof that there were any'."

It is essential that an act of bankruptcy be alleged or there is no jurisdiction. The rule is stated in Remington, Vol. 1, Sec. 107.

See Rule 53 D 1, Fed. Rules of Civil Procedure.

Respectfully submitted,

COBB & UTLEY

By Francis B. Cobb [142]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Feb. 28, 1946. [143]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO
DISMISS

State of California

County of Los Angeles—ss.

Harold B. Pool, being first duly sworn, deposes and says:

That he is a creditor of the above named alleged bankrupt, and has a provable, general, unsecured claim, fixed as to liability, and liquidated as to amount, which claim arose by reason of legal services furnished to the alleged bankrupt within two years last past. That the reasonable value of said services was and is the sum of \$579.50, no part of which has been paid and the entire sum now remains due, owing, and unpaid.

That on or about the 2nd day of October, 1944, a petition in involuntary bankruptcy was filed against Abbot Kinney Company and thereafter on the 28th day of February, 1945, a creditors' first amended involuntary petition was filed; that an answer was filed to said amended involuntary petition and the same was set for hearing on July 25, 1945, and has been continued from time to time thereafter.

That the above entitled Court directed, by order of December [144] 14, 1945, that all issues raised by the amended involuntary petition and the alleged bankrupt's answer thereto, be determined by Benno M. Brink, Special Master.

That your petitioner has heretofore moved the Special Master to dispose of said involuntary petition and that other parties in interest have asked that said matters be disposed of on the ground that the involuntary petition

is fatally defective in its face, in that (a) the petitioning creditors are bond holders and are not entitled to file an involuntary petition since their obligation is still secured by their bond indenture and all rights of individual bond holders are vested in the Trustee for all bond holders under the terms of said trust indenture securing said bonds, (b) that the amended involuntary petition does not state an act of bankruptcy, (c) that the alleged bankrupt's amended answer shows the additional defenses of:

1. The petitioning creditors' claims are barred by the Statute of Limitations.

2. That the corporation was not insolvent at the time of the commission of the alleged act of bankruptcy.

That the affairs of the corporation and the rights of creditors are being materially injured by the delay and dilatory practices resorted to by the attorneys for the petitioning creditors and the attorneys for the alleged bankrupt; that your petitioner is unable to levy attachments upon the assets of the corporation or proceed to judgment upon his claim.

Wherefore, affiant prays that the above proceeding be dismissed and for such other and further relief as is just and proper in the premises.

HAROLD B. POOL

Subscribed and sworn to before me, this 28 day of Feb., 1946

MYRTLE I. RUSSELL

Notary Public in and for said County and State. [145]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Feb. 28, 1946. [146]

[Title of District Court and Cause.]

Appearances:

Nicholas & Davis, 634 South Spring Street, Los Angeles 14, California, VAndike 6121, Attorneys for Petitioning Creditors.

Grainger & Hunt, 354 South Spring Street, Los Angeles 13, California, TRinity 0649, Attorneys for Alleged Bankrupt.

REPORT OF SPECIAL MASTER ON INVOLUNTARY PETITION IN BANKRUPTCY

To the Honorable J. F. T. O'Connor, Judge of the above entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of this court, before whom the above entitled matter is pending, as Special Master, do hereby report as follows:

This is a proceeding in involuntary bankruptcy, commenced October 21, 1944, in which the pleadings now before the Court are a First Amended Involuntary Petition, filed February 28, 1945, and an Amended Answer thereto, filed July 20, 1945.

The sole act of bankruptcy alleged in the First Amended Involuntary Petition is that the alleged bankrupt, while insolvent and within four months preceding the commencement of this proceeding, paid to Charles Brown and others the sum of \$7500.00 upon an antecedent debt, with the intent, so it is alleged, of preferring the said Charles Brown and his associates over other creditors of the alleged bankrupt. [147]

The Amended Answer admits the payment of the sum of \$7500.00 to Charles Brown, but denies all of the

other allegations of the First Amended Involuntary Petition with respect to the commission of the alleged act of bankruptcy. The Amended Answer also raises the issue as to whether the petitioning creditors are qualified, under the Bankruptcy Act, to file an involuntary bankruptcy petition against the alleged bankrupt and the Amended Answer alleges that, if the petitioning creditors are so qualified, their claims are barred by the Statute of Limitations.

The payment of \$7500.00 admitted by the alleged bankrupt to have been made to Charles Brown was in connection with a certain "sprinkler" contract upon which, on its face, the alleged bankrupt was indebted for a very substantial sum of money. Shortly before the \$7500.00 payment was made the alleged bankrupt's creditor on this contract had assigned it to Brown upon the payment to the said creditor of the sum of \$15,000.00. After this bankruptcy proceeding had commenced the further sum of \$30,000.00 out of the bankrupt's funds was paid to Brown on the said contract leaving still, on its face, a substantial amount owing thereon.

A bitter controversy arose over the said \$30,000.00 payment and in course of time the money was deposited with the Clerk of this Court, under an amended stipulation which was filed in this case on January 17, 1945.

This entire matter was first referred to Referee Hugh L. Dickson, one of the Referees in Bankruptcy of this Court. After proceeding with the case for some time Referee Dickson disqualified himself and the matter was referred to me.

On November 3, 1944, the alleged bankrupt filed its motion to dismiss the involuntary petition herein. On

February 15, 1945 Referee Dickson, upon the stipulation of the parties, granted this motion, with leave to amend. Thereupon, on February 28, 1945, the First Amended Involuntary Petition in this case was filed. [148]

On December 19, 1944, a petition for the appointment of a receiver was filed in this matter. On January 17, 1945 Referee Dickson filed his order denying the said petition without prejudice.

On July 19, 1945 Harold B. Pool, a creditor, John Harrah, director, and Carleton Kinney, stockholder, filed a Petition in Intervention in Opposition to the First Amended Involuntary Petition in this matter and their Notice of Motion on the said petition. The said motion to intervene was denied by Referee Dickson and after the case had been referred to me the motion was renewed and was again denied.

Thereafter I heard and determined the controversy on the \$30,000.00 on deposit with the Clerk and ruled that \$7500.00 thereof should be paid to Brown and \$22,500.00 to the alleged bankrupt. I further held that the sprinkler contract was fully paid and that the alleged bankrupt had no further liability thereon. A review was taken from my order in the premises and the same is now pending before Your Honor.

The amended stipulation, under which the \$30,000.00 was deposited with the Clerk, was entered into by Brown, by the petitioning creditors in this case and by the alleged bankrupt. The amended stipulation provided, among other things, that "proceedings to determine the sufficiency of the said involuntary petition, or amendments thereto, shall be prosecuted with due diligence, and all other mat-

ters pertaining to the solvency or insolvency of the alleged bankrupt, and the commission by it of an act, or acts, of bankruptcy, shall likewise be prosecuted with due diligence." The amended stipulation also provided that the parties thereto should have at least five days notice of all hearings in this proceeding.

The First Amended Involuntary Petition was not brought on for hearing before I heard and determined the \$30,000.00 controversy and thereafter the hearing on said petition was continued from time to time by consent of counsel for the petitioning creditors and counsel [149] for the alleged bankrupt.

In connection with the aforesaid review of the order relating to the \$30,000.00 controversy, Your Honor, on December 14, 1945, made an order in which reference was made to the aforesaid stipulation and to the order of reference in this matter. In the said order Your Honor directed me, as Special Master, to proceed with the hearing on the involuntary petition in bankruptcy.

Thereupon I notified counsel in the case to prepare for an early hearing. In due time counsel submitted to me a stipulation which was intended to limit the issues to be heard and determined. I informed counsel that I could not proceed in the matter in the manner provided for by the stipulation unless and until they secured from Your Honor an appropriate modification of the order of special reference in this matter. This was not done and after some delay, due largely to the attendance of one of counsel at the session of the State Legislature, of which he is a member, I set the matter definitely for hearing on March 8, 1946.

At that time counsel presented a revised stipulation which limited the issues to be determined to two items: (1) the ownership of the sprinkler system which the alleged bankrupt had acquired under the sprinkler contract here involved; and (2) the ownership of the \$30,000.00 on deposit with the Clerk. The stipulation provided that if the Special Master found that the sprinkler system belonged to the alleged bankrupt, free and clear of any claim or lien thereon or thereto, and if the Special Master further found that the alleged bankrupt was the owner of not less than \$20,000.00 of the money on deposit with the Clerk, the Special Master might also find that the alleged bankrupt was solvent and recommended to the Court that the involuntary proceeding be dismissed. The stipulation further provided, in effect, that if the Special Master found otherwise than above stated he might also find that the alleged bankrupt was insolvent and recommend that an order of adjudication be entered. [150]

By the stipulation the alleged bankrupt, in effect, waived all of its defenses to the First Amended Involuntary Petition except the defense of solvency and as to that issue both the petitioning creditors and the alleged bankrupt agreed that it might be determined on the two points hereinbefore mentioned.

Francis B. Cobb, Esq., of the law firm of Cobb and Utley, appeared at the hearing on March 8, 1946 to make certain objections on behalf of Charles Brown and on behalf of an alleged creditor in the case. Objection was made that Mr. Cobb had no right to be heard for the reason that his clients were not parties to this involuntary proceeding. I refused to hear Mr. Cobb, as attorney for

the aforesaid alleged creditor, but I ruled he should be heard, nevertheless, since his client, Charles Brown, was entitled to notice of all hearings, under the amended stipulation whereby the \$30,000.00 was deposited with the Clerk.

Mr. Cobb thereupon made these objections:

(1) That the Special Master should not proceed under the aforesaid stipulation without proof that the attorney who signed it on behalf of the alleged bankrupt had authority so to do. Your Special Master overruled this objection. The attorney in question Kyle Z. Grainger, Esq., is admitted to practice in this Court and he appears in this case for the firm of Grainger and Hunt, the attorneys of record for the alleged bankrupt. Under such circumstances the Court should not concern itself with his authority to act unless the question is raised by the alleged bankrupt itself.

(2) That the method of disposing of this case, as proposed by the aforesaid stipulation, did not conform to the order of reference in this matter or to Your Honor's order of December 14, 1945, or to the terms of the amended stipulation under which the \$30,000.00 was deposited with the Clerk. Your Special Master overruled this objection. Your Honor's order directed the Special Master to proceed under the order of reference of July 24, 1945. That order appoints me [151] Special Master to hear the issues raised by the pleadings in this case and gives me full power, as Special Master, "to hear the issues raised by said pleadings, make findings of fact, conclusions of law, and report the same, together with his recommendation to this Court." This is the customary and usual

phraseology used in referring an involuntary bankruptcy petition to a Special Master. Under such an order of reference the Special Master may permit the parties to stipulate as to any or all of the issues raised by the pleadings in the case. Therefore, clearly, the stipulation here in question does not do violence to Your Honor's order of December 14, 1945 or to the order of reference of July 24, 1945. The one question then remains—does the stipulation violate the amended stipulation under which the \$30,000.00 was deposited with the Clerk. With that question, I hold, we are not here concerned. The amended stipulation, just mentioned, did not make Brown a party to the involuntary petition in bankruptcy or entitle him to be heard in opposition thereto. It merely contained certain provisions with respect to the prosecution of the involuntary petition in this case. Such provisions do not deprive this Court of its jurisdiction or power to permit such disposition of the involuntary proceeding as may appear to it to be appropriate in the premises. This Court is not compelled by the amended stipulation, under which the money was deposited with the Clerk, to require the petitioning creditors and the alleged bankrupt to submit to the Court for decision each and all of the issues raised by the pleadings in this case. If the petitioning creditors and the alleged bankrupt, by their stipulation for the disposition of this case, have violated the amended stipulation, under which the money was deposited with the Clerk, Brown may perhaps be entitled to complain elsewhere, but not here.

Having disposed of the aforesaid objections made by Mr. Cobb your Special Master proceeded to the hearing of the issues presented by the aforesaid stipulation. The

only evidence introduced was the [152] transcript of the evidence introduced at the hearing of the Order to Show Cause directed to William Harrah, John Harrah, Charles Brown and E. A. Gerety relative to the ownership of the sprinkling system here involved and the disposition of the sum of \$30,000.00 now held by the Clerk of this Court as a Court of Bankruptcy.

Upon the said evidence your Special Master now makes the following

Findings of Fact

I.

Your Special Master finds that the sprinkler system presently located on the premises of the alleged bankrupt belongs to the alleged bankrupt, free and clear of any claim or lien thereon or thereto.

II.

Your Special Master further finds that the sum of \$22,500.00 of the sum of \$30,000.00 now on deposit with the Clerk of this Court, as a Court of Bankruptcy, belongs to the alleged bankrupt.

III.

Your Special Master further finds, from the foregoing facts already found and pursuant to the stipulation of the parties hereto, that the alleged bankrupt is not insolvent and was not insolvent at the time of the alleged commission of the act of bankruptcy alleged in the First Amended Involuntary Petition herein.

Upon the foregoing Findings of Fact your Special Master now states the following

Conclusions of Law

Your Special Master concludes that the alleged bankrupt did not commit the act of bankruptcy alleged in the First Amended Involuntary Petition herein and that the said petition should be dismissed.

Recommendations

Upon the foregoing Findings of Fact and Conclusions of Law your Special Master respectfully recommends that an order be entered [153] dismissing the First Amended Involuntary Petition herein.

Papers Submitted

I hand up for the information of the Court the following papers:

1. Creditors' Petition, filed October 21, 1944.
2. Notice of Motion to Dismiss Involuntary Petition, filed November 3, 1944.
3. Notice of Change in Date, etc., filed November 15, 1944.
4. Petition for Appointment of Receiver, filed December 19, 1944.
5. Substitution of Attorneys, filed December 29, 1944.
6. Stipulation and Order Approving Same, filed January 5, 1945.
7. Amended Stipulation and Order Approving Same, filed January 9, 1945.
8. Order Setting for Hearing Motion to Dismiss, etc., filed January 17, 1945.

9. Order Denying Petition for Appointment of Receiver, filed January 17, 1945.
10. Order Directing Payment of Money, etc., filed January 17, 1945.
11. Creditors' First Amended Involuntary Petition, filed February 28, 1945.
12. Copy of Answer of Alleged Bankrupt, filed March 13, 1945.
13. Affidavit of Harold B. Pool, filed July 19, 1945.
14. Points and Authorities in Support of Motion to Intervene, filed July 19, 1945.
15. Stipulation, filed July 20, 1945.
16. Order Permitting Bankrupt to File Amended Answer, filed July 20, 1945. [154]
17. Copy of letter from Cobb & Utley to Grainger & Hunt, filed January 17, 1946.
18. Notice of Trial, filed March 4, 1946.
19. Stipulation, filed March 8, 1946.
20. Exhibits 1 and 2, filed pursuant to the above mentioned stipulation, being volumes 1 and 2 of the Reporter's Transcript of Testimony and Proceedings in re Alleged Bankrupt vs. Charles J. Brown, et al.

Note: The following papers were transmitted, on September 12, 1945, with the Referee's Certificate on Petition for Review of Order in re Disposition of Money held by Clerk of Court:

1. Petition in Intervention in Opposition to Amended Involuntary Petition, filed July 19, 1945.

2. Notice of Motion on Petition to Intervene, filed July 19, 1945.
3. Amended Answer of Alleged Bankrupt, filed July 20, 1945.

Compensation of Special Master

Your Special Master respectfully suggests that in disposing of this matter provision should be made by Your Honor for the payment of such compensation as Your Honor may find it appropriate and proper to award to the Special Masters in this case for their services in connection with the involuntary proceeding and the \$30,000.00 controversy.

The record shows that on October 23, 1944 an order of general reference was made to Referee Dickson, as Referee; that on June 1, 1945 an order was made assigning the involuntary proceeding to Referee Dickson for hearing, pursuant to a stipulation that the trial of the proceeding might be before the Judge or before one of the Referees of the Court, as Special Master; that on July 23, 1945 [155] Referee Dickson disqualified himself as Special Master; that on July 23, 1945 an order was entered referring the matter to me, as Special Master; that on July 24, 1945 another order was entered referring the involuntary proceeding to me, as Special Master; that on August 13, 1945 Referee Dickson filed a certificate disqualifying himself as Special Master and as Referee; that on August 13, 1945 I filed a certificate that I had heard the \$30,000.00 controversy as Referee; and that on August 13, 1945 an order was entered, nunc pro tunc as of July 23, 1945, referring this proceeding to me as Referee.

The compensation of a Referee in Bankruptcy is fixed by section 40 of the Bankruptcy Act and section 72 of the Act provides that no other or further compensation shall be allowed for his services as required by the Act. Section 22 of the Act provides that a reference may be made to a Referee at any stage of a proceeding.

It is believed that a reference ought not to be made to a Referee, as Special Master, if it could be made to him, as Referee.

Except for the \$15.00 filing fee there is no compensation allowable to a Referee under section 40 of the Bankruptcy Act as this case now stands. Therefore, if compensation is to be allowed it must be upon the basis that the services rendered were not required by the Bankruptcy Act. In this connection Your Honor's attention is directed to the fact that the order of June 1, 1945, hereinbefore mentioned, was made pursuant to the stipulation of the parties, and to the further fact that the parties by their amended stipulation, hereinbefore mentioned, placed the \$30,000.00 fund in the custody of this Court and that the controversy over the said fund was brought on for hearing before the Referee by one of the parties to the said amended stipulation.

Your Special Master spent approximately seven days of his time in connection with this involuntary proceeding and the \$30,000.00 [156] controversy and he is authorized to say by Referee Dickson that he spent approximately three days of his time in connection with said matters.

Your Special Master, therefore, respectfully prays that Referee Hugh L. Dickson be allowed the sum of \$150.00

and that your Special Master be allowed the sum of \$350.00 for services rendered in this matter and that Your Honor designate the manner in which and the person or persons by whom the said respective amounts should be paid.

Respectfully submitted this 27th day of March, 1946.

BENNO M. BRINK

Special Master

[Endorsed]: Filed Mar. 27, 1946. [157]

[Title of District Court and Cause.]

MOTION TO DISMISS INVOLUNTARY
PETITION

To Frank Williams, Moses C. Davis, Charles W. Cradick
and to their attorneys, Nicholas & Davis:

You, and each of you, will please take notice that on
Tuesday 14th

~~Monday~~, November 13, 1944, at 10 A. M. thereof, the
Abbot Kinney Company, the respondent herein, will move
the above entitled court, in the court room of the Honor-

Hugh L. Dickson, Referee
able J. F. F. O'Connor, in the Federal Court House and
Post Office Building, 312 North Spring Street, Los An-
geles, California, for an order dismissing the Involuntary
Petition in Bankruptcy filed herein by you against the
said respondent, the said motion will be made upon the
following grounds, to-wit:

1. That the said involuntary petition does not state facts sufficient to constitute grounds upon which to base an adjudication in bankruptcy.

2. That the said petition is uncertain in this that it cannot be learned nor ascertained therefrom:

(a) Whether or not either of the said petitioners are unsecured creditors.

(b) In what amount, if any, the said petitioners are severally unsecured *creditor* of the said respondent.

(c) Whether the alleged payment to Charles J. Brown and others was made to secured or unsecured creditors and what amount, if any, was paid to Charles J. Brown and what amount, if any, was [158] paid to the others, and who the others are, and whether or not the said payment did in fact result in a preference.

(d) How any interest or money is due on said bonds at the present time.

(e) Whether or not the said respondent was insolvent at the alleged date of the alleged payment to Charles J. Brown and others.

3. That said petition is ambiguous in each and every particular in which it is herein alleged to be uncertain.

4. That said petition is unintelligible in each and every particular in which it is herein alleged to be uncertain.

Said motion will be based upon this Notice and Motion together with all the files and records on file herein and upon the grounds set forth herein.

Wherefore said respondent prays that said petition be hence dismissed and for such other relief as is proper in the premises.

HIRAM E. CASEY
HAROLD B. POOL

By Hiram E. Casey
Attorneys for Respondent

I hereby certify that I am one of the attorneys for respondent, and in my opinion, the foregoing motion is well taken in point of law and not filed for delay.

HIRAM E. CASEY
Attorney [159]

AUTHORITIES

Burns Bros. v. Cook Coal Co., 46 Fed. 2d 31
In re Morgan, 39 Fed. 2d 489 (15 ABRNS 661)
Sec. 3 Bankruptcy Act, Sub A (3)
Sec. 3 Bankruptcy Act, Sub C
Sec. 4 Bankruptcy Act, Sub 4.

The petition is a pleading and hence all essential facts giving capacity to the parties and jurisdiction to the court and forming the elements of the cause of action must be alleged and their allegation must conform to the usual rules of pleading.

In re Plotke, 104 Fed. 964

To be a creditor to whom a transfer will enable the obtaining of a preferential percentage of his debt over other creditors of the same class, a person must own a demand or claim provable against the bankrupt.

Crafts-Riordan Shoe Co., 26 A. B. R. 449

If any of the petitioning creditors claim is alleged to be a secured claim, the excess of the debt over the security should also be alleged.

In re Triangle, 267 Fed. 300

Section 4 B of the Bankruptcy Act specifically exempts from its application Building & Loan Associations, Municipal, Railroad, Insurance or Banking corporations.

A petition in involuntary bankruptcy held insufficient in that it did not state facts showing either that the defendants were subject to adjudication under the statute or the capacity of petitioners to maintain the petition.

In re: Parker, 283 Fed. 404

Sec. 267 Rem. Bankruptcy, Vol. 1, 4th Edition.

[Endorsed]: Filed Nov. 3, 1944 at 50 min. past 3 o'clock P. M. Hugh L. Dickson, Referee.

[Endorsed]: Filed Mar. 27, 1946. [160]

[Title of District Court and Cause.]

AMENDED STIPULATION AND ORDER
APPROVING SAME

The petitioning creditors in the above-entitled involuntary proceeding in bankruptcy, the alleged bankrupt, and Charles J. Brown, having signed and filed herein a stipulation, approved by the court, concerning the disposition of \$30,000.00 now held by Charles J. Brown, and it appearing that the terms and conditions of the said stipulation should be clarified in order to make plainer the intentions of the parties,

It is hereby agreed that the said stipulation shall be amended to read as follows:

“Whereas, an involuntary petition in bankruptcy has been filed in the above-entitled proceeding in the above-entitled court against the above-named alleged bankrupt and is now pending; and

“Whereas, the petitioning creditors therein have heretofore filed herein a petition for an order requiring the said Charles J. Brown to pay over to the estate of the alleged bankrupt the said sum of \$30,000.00, which the alleged bankrupt contends was unlawfully paid to the said Charles J. Brown out of such estate subsequent to the filing of the said involuntary petition, and an order to show cause thereon has been issued against the said Charles J. Brown, and said petition and order to show

cause are now pending before the above-entitled court; and [161]

“Whereas, the said Charles J. Brown has filed herein a petition for the appointment of a receiver in bankruptcy prior to adjudication, and such petition is now pending before the above-entitled court; and

“Whereas, the above-entitled proceeding has been referred by the court generally for administration by its order to Hugh L. Dickson, a referee in bankruptcy in said court, pursuant to the provisions of Section 22 of the National Bankruptcy Act of 1898, as amended; and

“Whereas, a dispute has arisen between the alleged bankrupt and Charles J. Brown with respect to the cancellation by said alleged bankrupt of certain leases held by the said Charles J. Brown,

“Now, Therefore, It Is Hereby Stipulated and Agreed as Follows:

“1. The said petition of Charles J. Brown for the appointment of a receiver in bankruptcy may be denied without prejudice, and the bond heretofore posted by the said Charles J. Brown, pursuant to the provisions of Section 3-(e) of the said bankruptcy act, shall be exonerated.

“2. The said petition for an order requiring the said Charles J. Brown to pay back the said sum of \$30,000.00, shall be denied, and the said order to show cause issued thereon, shall be discharged, both without prejudice.

"3. The said Charles J. Brown shall pay over to the Clerk of the above-entitled court, as a court of bankruptcy, the said sum of \$30,000.00, to be impounded and held by him, pursuant to the provisions of Sections 851 and 852 of the Judicial Code of the United States, under the following terms and conditions:

"(a) The pending motion by the alleged bankrupt to dismiss the said involuntary petition shall be reset for hearing upon the court calendar at the earliest possible date in February, [162] 1945, but not later than February 16, 1945, and thereafter proceedings to determine the sufficiency of the said involuntary petition, or amendments thereto, shall be prosecuted with due diligence, and all other matters pertaining to the determination of the solvency or insolvency of the alleged bankrupt, and the commission by it of an act, or acts, of bankruptcy, shall likewise be prosecuted with due diligence. Nothing herein contained shall be deemed to prevent the alleged bankrupt from commencing herein a proceeding under Chapters X or XI of the Bankruptcy Act.

"(b) Each of the parties hereto shall be given notice in writing of the time and place of all hearings in the above-entitled proceeding at least five days prior to any such hearing.

"(c) In the event the above-entitled involuntary proceeding is finally dismissed, the said sum of \$30,000.00 shall be returned by the said Clerk to the said Charles J. Brown without deduction of any amount whatever, un-

less, prior to ten days after such final order of dismissal, the alleged bankrupt shall serve upon the parties hereto, and file herein, an application that the said sum of \$30,000.00, or a part thereof, shall be paid over to it, in which event the said sum shall be retained by the said Clerk and disbursed by him to the person or persons whom the above-entitled court shall finally determine is or are entitled thereto after due hearing upon notice to the parties hereto, or, if the said court shall decide that it does not have jurisdiction to determine who is entitled thereto, then, and in that event, the said sum shall be returned by the said Clerk to the said Charles J. Brown without any deduction therefrom whatsoever, without prejudice.

“(d) In the event a final order of adjudication is made in the above-entitled proceeding, or a final order is made approving the commencement of a Chapter X or XI proceeding under the Bankruptcy Act, the said sum of \$30,000.00 shall be paid over [163] the said Clerk to the receiver in bankruptcy, the trustee in bankruptcy, or the debtor-in-possession herein, as the case may be, unless prior to ten days after such final order of adjudication, the said Charles J. Brown shall serve upon the parties hereto, and file herein, an application that the said sum of \$30,000.00., or a part thereof, shall be paid over to him, in which event the said sum shall be retained by the said Clerk and disbursed by him to the person or persons whom the above-entitled court shall finally determine is or are

entitled thereto after due hearing upon notice to the parties hereto.

“(e) Pending the determination by the above-entitled trial court of all the matters above set forth, the alleged bankrupt shall not take any further action whatsoever in the matter of the cancellation of any lease, or purported lease between the alleged bankrupt, as lessor, and Charles J. Brown, as lessee, by reason of any cause now existing, as set forth in notices of cancellation dated December 21, 1944.”

Dated: This 8 day of January, 1945.

H. B. POOL & HIRAM E. CASEY

By H. B. Pool

Attorneys for Charles J. Brown

GRAINGER AND HUNT

By Reuben G. Hunt

Attorneys for Alleged Bankrupt

NICHOLAS & DAVIS

By Wm. Howard Nicholas

Attorneys for Petitioning Creditors [164]

ORDER

Upon consideration of the foregoing amended stipulation It Is Hereby Ordered that the said amended stipulation be and the same is hereby approved.

Dated: This 9th day of January, 1945.

HUGH L. DICKSON

Referee in Bankruptcy

[Endorsed]: Filed Jan. 9, 1945, at 50 Min. past 9 o'clock A. M. Hugh L. Dickson, Referee; Clerk J. B.

[Endorsed]: Filed Mar. 27, 1946. [165]

[Title of District Court and Cause.]

ORDER DIRECTING PAYMENT OF MONEY
TO THE CLERK OF THE COURT

Pursuant to the Amended Stipulation entered into and filed herein by the petitioning creditors in the above-entitled involuntary proceeding in bankruptcy, the alleged bankrupt, and Chas. J. Brown, which Stipulation has been approved by the Court, and a copy of which is attached hereto and made a part hereof as "Exhibit A",

It Is Hereby Ordered that Chas. J. Brown shall forthwith pay over to the Clerk of the above-entitled Court the sum of \$30,000.00, and that said sum shall be held and impounded by the said Clerk as custodian only, pursuant to the provisions of Sections 851 and 852 of the Judicial Code of the United States.

It Is Hereby Further Ordered that neither the whole nor any part of the said sum of \$30,000.00 shall be disbursed by said Clerk except upon an Order made by the above-entitled Court to one of the parties to the said Stipulation, ~~after hearing upon due notice to each of the said parties;~~ and in the manner provided for in said Stipulation. [H.B.P. R.G.H. M.P.D. ~~W.H.N.~~]

Dated: This 18th day of January, 1945.

HUGH L. DICKSON

Referee in Bankruptcy

United States of America
Southern District of California
Central Division—ss.

I, Hugh L. Dickson, Referee in Bankruptcy in and for the County of Los Angeles, State of California, in and for the said District, do hereby certify that the within instrument is a true and correct copy of the original as the same appears of record in my office.

In Witness Whereof, I have hereunto set my hand this 18th day of January, 1945.

HUGH L. DICKSON

Referee in Bankruptcy [166]

The foregoing Order is hereby approved this 8th day of January, 1945.

H. B. POOL and HIRAM E. CASEY

By Howard Pool

Attorneys for Chas. J. Brown

GRAINGER AND HUNT

By Reuben G. Hunt

Attorneys for Alleged Bankrupt

NICHOLAS & DAVIS

By M. Philip Davis

Attorneys for Petitioning Creditors

[Endorsed]: Filed Jan. 18, 1945. [167]

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO INTERVENE

Federal Rule Civil Procedure 24(a) (2)

Collier, 14th Ed. Vol. 2, p. 70

“Under the principles before stated and Federal Rule 24 (a) (2), it seems reasonably clear that where the stockholder can show that the corporate officials have refused and neglected to contest the petition and that this refusal is based not on an exercise of lawful business discretion but on a basis of fraud and abuse of their trust, the stockholder has an absolute right to intervene in the proceedings on behalf of the corporation.

The procedure for intervention in all cases should follow Federal Rule 24 (c), which provides:

‘A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the ground [168] and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought’.”

Remington, Volume 1, pages 385-388

“If, however, the lienholder is a creditor, and a fortiori if he is a creditor to an extent not covered by his security, he may, of course, intervene.

A purchaser of the bankrupt's property which had been sold under an execution, the lien of which had attached within the four months, was held competent to intervene in one case because, if the adjudication of bankruptcy should remain in force and the property be recovered by

the trustee, the purchaser would then become a creditor since he would be the owner of the whole or a part of the demand represented by the judgment to satisfy which the property had been sold. See *Abbott v. Wauchula Mfg. Co.* 36 A. B. R. 310, 229 Fed. 677 (C. C. A. Fla.)”

“*Ogden & Jamison v. Gilt Edge Mines Co.* 34 A. B. R. 893, 225 Fed. 723 (C. C. A. S. Dak.): ‘That stockholders of a corporation may, in equity, either sue for or defend on behalf of the corporation, if the directors fraudulently fail to do so, or where they are the beneficiaries of the action, is a well recognized principle of equity jurisprudence. . . . The allegations in the petition for leave to intervene, and the proposed answer made a part thereof, clearly show such a condition of affairs as to justify stockholders to intervene and defend on behalf of the corporation when the directors, charged with the protection of the corporate property, are adversely interested, and not only refuse to defend but confess judgment, as is alleged in the proposed answer, and as is shown by the record to have been done.’” [169]

Remington 1701. In order to obtain a preference a creditor receiving payment must be of the same class. If no other creditor of the same class, no preference.

In re Star Spring Bed Co. 257 F. 176, 265 F. 133

Creditors eligible to file involuntary petition must “have provable claims fixed as to liability and liquidated as to amount”. Section 59, subdivision b, Bankruptcy Act as amended.

Respectfully submitted,

COBB & UTLEY

By Francis B. Cobb

Received copy of the within this 18 day of July, 1945.
Grainger & Hunt, C., Attorney for Alleged Bankrupt.

Received Jul. 18, 1945. Nicholas & Davis, G. B. H.

[Endorsed]: Filed Jul. 19, 1945, atMin. past
9 o'clock A. M. Hugh L. Dickson, Referee.

[Endorsed]: Filed Mar. 27, 1946. [170]

[Title of District Court and Cause.]

AFFIDAVIT OF HAROLD B. POOL

State of California

County of Los Angeles—ss.

Harold B. pool, being first duly sworn, deposes and
says:

That he is a creditor of the above named alleged bank-
rupt having a provable debt in the amount of \$500.00,
that he is one of the attorneys who signed a stipulation
on file herein bearing date of January 8, 1945.

That since January 8, 1945, affiant has called on nu-
merous occasions on Grainger & Hunt, requesting that a
hearing be had on the amended involuntary petition and
on the last call the following occurred:

By affiant: Has the matter of insolvency been set
down for hearing?

By Grainger: Set down for the 18th of July.

By affiant: What preparation is being made for trial
of the insolvency question? [171]

By Grainger: I have been conferring with Mr. Davis.

By affiant: Any member of the board other than the
Davis group can give you the information and it would

seem that you should confer with some one that knows the picture other than with your adversary.

That affiant has not been consulted nor to affiant's knowledge has any member of the board been contacted in respect to the defense.

HAROLD B. POOL

Affiant

Subscribed and sworn to before me this 17th day of July, 1945.

FRANCIS B. COBB

Notary Public in and for the County of Los Angeles,
State of California

[Endorsed]: Filed Jul. 19, 1945, atMin. past 9 o'clock A. M. Hugh L. Dickson, Referee.

[Endorsed]: Filed Mar. 27, 1946. [172]

[Title of District Court and Cause.]

ORDER PERMITTING BANKRUPT TO FILE
AMENDED ANSWER

Good cause appearing therefor,

It Is Hereby Ordered that Abbott-Kinney Company, the alleged bankrupt above named, may file herein its Amended Answer of Alleged Bankrupt to the First Amended Involuntary Petition filed herein.

Dated this 20 day of July, 1945.

HUGH L. DICKSON

Referee in Bankruptcy

[Endorsed]: Filed Jul. 20, 1945, at min. past o'clock M. Hugh L. Dickson, Referee.

[Endorsed]: Filed Mar. 27, 1946. [173]

[Title of District Court and Cause.]

[MEMORANDUM ORDER]

Nicholas & Davis, Los Angeles, California, Attorneys
for Petitioning Creditors,

Grainger & Hunt, Los Angeles, California, Attorneys
for Alleged Bankrupt,

O'Connor, J. F. T., Judge.

The report of the Special Master on involuntary petition in bankruptcy in the above entitled matter is before this court for review.

The Special Master, in his report, recommends against an adjudication, which means a denial of the involuntary petition.

The findings and recommendations of the Special Master on this one issue are approved, and it is the order of this court that the involuntary petition be dismissed.

The principal controversy is really a collateral matter: the determination of the ownership of the \$30,000. paid to Charles J. Brown after the filing of the involuntary petition in bankruptcy. The ownership of the said \$30,000 fund was determined by the Referee (not as Special Master), and his order in connection therewith is now before this court on review. [174]

The alleged bankrupt corporation, Abbot Kinney Company, was indebted for the purchase of a certain sprinkler contract to F. R. Cruickshank & Company for a large sum of money. The creditor offered to accept from the corporation ten thousand (\$10,000) dollars in full payment of the balance due on the sprinkler contract, and the corporation was financially able to make such payment and purchase the contract.

John Harrah was a member of the Board of Directors of the alleged bankrupt corporation, and the Executive Committee was composed of John Harrah, Carleton Kenney, and Alfred U. Newton. It is clear that Carleton Kenney was under the domination of John Harrah. E. A. Gerety was the general manager and chief executive officer of the corporation, and Charles J. Brown was a close friend of John Harrah and his son, William Harrah. At the instigation of John Harrah, a conspiracy was entered into between John Harrah, William Harrah, Charles J. Brown, and E. A. Gerety, the object of which was to have the Executive Committee refuse to purchase the sprinkler contract for the sum of ten thousand (\$10,000) dollars and to have Charles J. Brown purchase the same for the conspirators, and thereafter demand from the corporation its payment, and that Charles J. Brown did so purchase the contract for fifteen thousand (\$15,000) dollars. E. A. Gerety and John Harrah, thereafter, told Brown that the corporation had seventy-five hundred (\$7500) dollars cash on hand which would be paid to him upon his demand and said sum was so paid.

John Harrah had, prior thereto, as a member of the Executive Committee and Board of Directors, stated that the contract was of no value and that he would not authorize payment thereon so long as the bonded indebtedness remained unpaid. After the contract was acquired by Brown, John [175] Harrah instructed Carleton Kenney to vote for payment of \$7500 demanded by Brown, and, thereafter, Gerety and John Harrah told Brown that the corporation had \$30,000 on hand and on November

7, 1944 thereafter, the involuntary petition in bankruptcy was filed herein. John Harrah instructed the said Carleton Kenney to vote for such \$30,000 payment, which was thereupon paid to Charles Brown. The written assignment of the contract to Brown was for the benefit of Gerety, John Harrah, William Harrah and Brown.

On November 30, 1944, William Harrah notified the corporation that he had purchased a one-third interest in the unpaid balance of the sprinkler contract on November 25, 1944. Brown and his associates strenuously contended that the court was without jurisdiction, notwithstanding the provisions of the stipulation signed by all of the parties and filed with the court.

The authorities hold that, under the facts in this action, the court has jurisdiction to determine the ownership of the \$30,000.

An involuntary petition in bankruptcy has been filed against a corporation within this jurisdiction by three persons who represent that they are creditors and an act of bankruptcy is alleged. True, they may ultimately be determined to be secured creditors and could not qualify as petitioning creditors. On the other hand, they might show that their alleged security was valueless. They might not be able to support the alleged act of bankruptcy, but, while the proceeding was before the bankruptcy court, the bankruptcy court was a court of competent jurisdiction to determine matters pertaining to the property of the bankrupt, and property found in the pos-

session of the bankrupt. No other court [176] during the pendency of the proceeding could, without the consent of the bankruptcy court, entertain litigation in connection with the property of the alleged bankrupt. (*Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734)

During the pendency of the proceedings, it would be quite possible and proper for persons to appear in this proceeding claiming to own property in the possession of the bankrupt and request that their property be released to them, and should the court upon the said hearing determine that they were not entitled to the return of the property, and it belonged to the bankrupt, such a determination would be *res adjudicata* in any subsequent proceedings.

While the situation is not quite kindred, nevertheless this \$30,000 was in the possession of the alleged bankrupt at the date these proceedings were filed. That date is the line of cleavage, and the fact that it came to Brown's hands and back to the Clerk of the court makes little difference. Let us suppose that the property was in the hands of the alleged bankrupt and some person claimed it, and the debtor by a proceeding during the pendency of the proceeding brought the person so claiming the property before the court—we will say upon a matter not as highly contested as here. Let us assume that the debtor was not sure of its position and was not sure if the debtor or the claimant owned the property, and that the court after a full determination determined that it was the property of

the debtor. That determination would be a final determination binding the parties in the future.

This rule is necessary since the filing of a bankruptcy proceeding, regardless of whether an adjudication is secured or not, throws a blanket of protection upon all *pro*-[177] property of the alleged bankrupt and particularly property in the possession of the bankrupt whether owned by the bankrupt or not.

The court could assume or reject the jurisdiction herein exercised. In view of the agreement of the parties, and in view of the spirit and provisions of the Bankruptcy Act, the contested involuntary petition in bankruptcy should have been expeditiously disposed of and every collateral matter deferred, if possible, and relegated to the other courts after the dismissal of the involuntary petition—but we have had a most thorough and complete trial of the controversy. The records show most extensive presentation, examination and cross-examination of witnesses, production of documents, and the Referee's findings are extensive and complete. The record supports the findings of the Referee and it appears that his conclusions of law in the premises are proper and supportable. Therefore, it would not appear, at this stage of the proceedings, to be equitable for the court to exercise its discretion in refusing to entertain the matter which has already been tried, and on which findings have already been made, and direct the parties to enter upon the litigation again in some other court. The conclusion is, therefore,

that the court had jurisdiction and the findings of the Special Master are approved, on this point.

Had the strategy of respondents prevailed, and had they been able to force a hearing on the involuntary petition, instead of the order to show cause proceeding, then it is quite possible that the court would not have entertained at that stage, (and after dismissal of the involuntary petition,) a determination of the ownership of the thirty thousand (\$30,000) dollar fund. The record is so complete on the conspiracy and the various elements thereof, that the respondents could hardly [178] hope to secure a different result in any other court, state or federal.

The report of the Special Master on the involuntary petition in bankruptcy, including findings of fact, conclusions of law and recommendations, is approved by this court, with the following exceptions:

The Referee found that the corporation could have purchased the sprinkler contract for ten thousand (\$10,000) dollars, and, further, that the corporation was able to discharge its obligation and acquire the sprinkler contract, but was prevented from so doing, as stated.

The record clearly supports the position taken by the Referee up to this point, but beyond this point in applying those principles of equity which must be applied here, and in condemning the action of the conspirators, I cannot agree with the Referee's finding that the corporation should suffer through the acts of the conspirators and pay anything more than ten thousand (\$10,000) dollars upon the said contract. The Referee's order in effect is

penalizing the corporation five thousand (\$5,000) dollars in an effort to make whole the conspirators and make full restitution to them. All equities of the case lie in the other direction, and at this point only, the court disagrees with the Referee.

Since the primary element of the conspiracy was to cause the corporation to reject the ten thousand (\$10,000) dollar transaction with the principal, to the end that the conspirators could acquire the contract and make the corporation pay more than the ten thousand (\$10,000) dollars, it would be a partial recognition and sanction of the conspiracy to so provide herein that the corporation in effect pay more than the ten thousand (\$10,000) dollars. [179]

Therefore, the finding and order that seventy-five hundred (\$7500) dollars be repaid, is reversed, and

It Is Ordered:

That there shall be repaid the sum of twenty-five hundred (\$2500) dollars out of the thirty thousand (\$30,000) dollars on deposit, to the parties making the deposit, and the balance shall be paid to the corporation.

Each party shall pay one-half of the costs.

Let Judgment Be Entered Accordingly.

Dated this 27 day of May, 1946, at Los Angeles, Calif.

J. F. T. O'CONNOR

Judge

[Endorsed]: Filed May 27, 1946. [180]

In the District Court of the United States
Southern District of California
Central Division

In Bankruptcy No. 43,551 O'C.

In the Matter of ABBOT KINNEY COMPANY a
corporation, Alleged Bankrupt.

ORDER ON REVIEW FROM THE ORDER OF
THE REFEREE, DIRECTING CLERK OF THE
COURT TO PAY MONIES ON DEPOSIT TO
ABBOT KINNEY COMPANY, ET AL., AND
DETERMINING TITLE TO SPRINKLING
SYSTEM

At Los Angeles, California, in said District on the
27th day of May, 1946, before the Honorable J. F. T.
O'Connor, Judge presiding;

Whereas, an Involuntary Petition in Bankruptcy was
filed in the above entitled matter against the alleged bank-
rupt on October 21, 1944, by certain of its alleged credi-
tors; and,

Whereas, issue was joined on a First Amended In-
voluntary Petition in Bankruptcy filed February 28, 1945,
and an Amended Answer thereto filed July 20, 1945; and,

Whereas, by an Order duly given and made by this
court, said matter was referred to the Honorable Hugh
L. Dickson, one of the Referees in Bankruptcy of this
court; and,

Whereas, on or about November 8, 1944, two of the
three members of the "Executive Committee" of the al-
leged bankrupt paid to one Charles Brown, one of the

petitioners on review herein, \$30,000.00 of the alleged bankrupt's money on a certain "sprinkler contract", upon which the alleged bankrupt was alleged to be then [181] obligated; and,

Whereas, a controversy arose over the payment of said sum of \$30,000.00 and by Stipulation of the parties in interest, the \$30,000.00 was placed in the custody of the Clerk of this court, as a court of bankruptcy; and,

Whereas, on July 7, 1945, upon the petition of the alleged bankrupt, the Hon. Hugh L. Dickson, as Referee in Bankruptcy, issued an Order to Show Cause requiring the petitioners on review and one John Harrah, one of the aforesaid members of the "Executive Committee", to show cause why an Order should not be entered, (1) Adjudging the alleged bankrupt to be the owner of the aforesaid "sprinkler" contract and the sprinkling system covered thereby and decreeing that any interest therein, on the part of any of the respondents in the said order to show cause, was held by them in trust for the alleged bankrupt; and (2) Directing the Clerk of the court to pay to the alleged bankrupt, the sum of \$30,000.00 held by him, as aforesaid, and requiring Brown to return to the alleged bankrupt, the sum of \$7500.00 which had been paid to him, as aforesaid; and,

Whereas, John Harrah, one of the respondents named in the said Order to Show Cause, made an oral disclaimer of any interest in the aforesaid "sprinkler" contract and in the said sum of \$30,000.00; and,

Whereas, the petitioners on review filed written answers to the said Order to Show Cause and the petition upon which it was issued; and,

Whereas, Charles Brown and E. A. Gerety, two of the petitioners on review, filed written objections to the jurisdiction of this court to hear and determine the issues raised by the said Order to Show Cause and the petition upon which it was issued and William Harrah, the remaining petitioner on review orally adopted the said objections to jurisdiction; and,

Whereas, the said Order to Show Cause and the said [182] objections to the jurisdiction of this court came on for hearing before Referee Dickson on July 23, 1945 and the said objections to jurisdiction were overruled by him; and,

Whereas, it was then suggested by one of the counsel in the case that Referee Dickson was disqualified by reason of prejudice to proceed with the matter; and,

Whereas, Referee Dickson promptly stated that he was entirely free of bias and prejudice in the matter but that since the question had been raised, he would, if there was no objection, request the Hon. Benno M. Brink, Referee in Bankruptcy in this court, to proceed with the matter; and,

Whereas, no objection was made and the matter was referred to the Honorable Benno M. Brink, Referee in Bankruptcy, by an Order duly given and made by this court; and,

Whereas, the Order to Show Cause, the petition upon which it was issued and the answers thereto came on for hearing on July 24, 1945, at the hour of 10 o'clock A. M. before the Honorable Benno M. Brink, as Referee in Bankruptcy presiding, in Room 343, Federal Building, Los Angeles, California, Messrs. Grainger & Hunt by

Kyle Grainger, Esq. and Nicholas & Davis by M. Philip Davis, Esq., appearing for the alleged bankrupt; Cobb & Utley by Francis Cobb, Esq., appearing for Charles Brown; B. M. Kitzmiller, Esq., appearing for E. A. Gerety; Leslie L. Heap, Esq., appearing for William Harrah; and John Harrah, Esq., appearing *in propria persona*, and evidence both oral and documentary having been introduced and the same having been completed on July 27, 1945, and said Benno M. Brink as Referee in Bankruptcy having been fully advised in the premises, signed and filed his formal Findings of Fact and Conclusions of Law and Order in the matter on August 23, 1945; and,

Whereas, Charles Brown, E. A. Gerety and William Harrah filed a Petition for Review of said Order of August 23, 1945, and the Findings of Fact and Conclusions of Law made in respect thereto and [183] said petition for review is now before this court for its consideration and the court being fully advised in the premises:

It Is Hereby Ordered, Adjudged and Decreed that the Findings of Fact, and each of them, of the Honorable Benno M. Brink, Referee in Bankruptcy, signed and filed in this matter on the 23rd day of August, 1945, on the Order to Show Cause directed to the petitioners on review and one John Harrah, excepting only Finding of Fact XXXII, shall be and the same are hereby confirmed and are incorporated by reference as a part of this order to the same extent and with the same force and effect as if said Findings of Fact and each of them, were here set forth in full, and they and each thereof as so incorporated herein, are hereby adopted as the Findings of Fact of this court in this proceeding.

It is Further Ordered that Finding of Fact XXXII of said Hon. Benno M. Brink, Referee in Bankruptcy, shall be and is hereby rejected, reversed and modified by this court and the following Finding of Fact is made in lieu and in place thereof, to wit:

“XXXII.

It is true that Abbot Kinney Company, the alleged bankrupt, is entitled to receive \$27,500. of said money now on deposit with the Clerk of the above entitled court as a court of bankruptcy, and said Charles Brown and E. A. Gerety are entitled to receive the remaining \$2500. thereof.”

It Is Further Ordered that the Conclusions of Law, and each of them, of the Hon. Benno M. Brink, Referee in Bankruptcy, signed and filed in this matter on the 23rd day of August, 1945 on the Order to Show Cause directed to the petitioners on review and one John Harrah, excepting only Conclusions of Law V and VI, shall be and the same are hereby confirmed and are incorporated by reference as a part of this order to the same extent and with the same force and effect as if said Conclusions of Law and each thereof, were here set forth in full, and they and each thereof as [184] so incorporated herein, are hereby adopted as the Conclusions of Law of this court in this proceeding.

It Is Further Ordered that Conclusions of Law V and VI, respectively, of said Hon. Benno M. Brink, Referee in Bankruptcy, shall be and are hereby rejected, reversed

and modified by this court and the following Conclusions of Law are made in lieu and in place thereof, to wit:

“V.

That Abbot Kinney Company, the alleged bankrupt, is entitled to receive \$27,500. of said money now on deposit with the Clerk of the above entitled court, as a court of bankruptcy.

VI.

That Charles Brown and E. A. Gerety are entitled to receive \$2500. of said money now on deposit with the Clerk of the above entitled court, as a court of bankruptcy.”

It Is Further Ordered that the “Order Directing Clerk of the Court to Pay Monies on Deposit to Abbot Kinney Company, et al., and Determining Title to Sprinkling System” of the Hon. Benno M. Brink, Referee in Bankruptcy, signed and filed in this matter on the 23rd day of August, 1945 on the Order to Show Cause directed to the petitioners on review and one John Harrah, excepting those portions thereof which are hereinafter reversed, shall be and the same and each and every part thereof is hereby confirmed.

It Is Further Ordered that Abbot Kinney Company, the alleged bankrupt, is the owner of that certain sprinkling system installed by F. R. Cruickshank & Company on the property of Abbot Kinney Company, the alleged bankrupt, at Venice, Los Angeles, California, pursuant to that certain conditional sales contract entered into by and between F. R. Cruickshank & Company and Abbot Kinney

Company on or about June 2, 1931, free and clear of said conditional sales contract. [185]

It Is Further Ordered that neither E. A. Gerety, Charles Brown, John Harrah nor William Harrah has any right to collect any money on account of said conditional sales contract or to exercise any rights or to enforce any obligations thereunder as against Abbot Kinney Company, the alleged bankrupt; and,

It Is Further ordered that that portion of the "Order Directing Clerk of the Court to Pay Monies on Deposit to Abbot Kinney Company, et al., and Determining Title to Sprinkling System" of the Hon. Benno M. Brink, Referee in Bankruptcy, signed and filed in this matter on the 23rd day of August, 1945 on the Order to Show Cause directed to the petitioners on review and one John Harrah, which orders the sum of \$22,500. of the \$30,000. now on deposit with the Clerk of this court, as a court of bankruptcy, to be turned over and delivered to Abbot Kinney Company, the alleged bankrupt, and which orders the sum of \$7500. of the \$30,000. now on deposit with the Clerk of this court, as a court of bankruptcy, to be turned over and delivered to Charles Brown, shall be and are hereby reversed.

It Is Further Ordered that the Clerk of this court, as a court of bankruptcy, forthwith turn over and deliver to Abbot Kinney Company, the alleged bankrupt, \$27,500. of the \$30,000. now on deposit with said Clerk in this matter.

It Is Further Ordered that the Clerk of this court, as a court of bankruptcy, forthwith turn over and deliver \$2500. of the \$30,000. now on deposit with said Clerk in this matter.

It Is Further Ordered that neither E. A. Gerety, William Harrah, Charles Brown nor John Harrah were qualified under the Bankruptcy Act, on behalf of Abbot Kinney Company, the alleged bankrupt, or at all, to defend against the Involuntary Petition in Bankruptcy filed herein, or to raise any issue regarding the sufficiency of the original or amended Involuntary Petition in Bankruptcy filed herein; [186]

It is Further Ordered that this Court has jurisdiction to hear and determine all of the issues raised by the Order to Show Cause above referred to and the Answers of respondents filed thereto.

It Is Further Ordered that petitioners on review shall pay one-half of the costs herein and that the alleged bankrupt shall pay one-half of the costs herein, which costs shall be and are hereby fixed at the sum of \$..... The Clerk is ordered to deduct the said costs as allowed herein from the respective funds.

J. F. T. O'CONNOR

Judge of the District Court

Judgment entered Jun. 17, 1946. Docketed Jun. 18, 1946. Book COB 38, page 735. Edmund L. Smith, Clerk; by Francis E. Cross, Deputy.

[Endorsed]: Filed Jun. 17, 1946. [187]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Honorable J. F. T. O'Connor, Judge of the United States District Court:

To Abbot Kinney Company and their attorneys of record, Grainger & Hunt:

E. A. Gerety, William Harrah, Charles Brown and Harold Pool, feeling aggrieved by a decree and order entered in the above-entitled proceeding under date of June 17, 1946, and entitled "Order on Review from the Order of the Referee, Directing Clerk of the Court to Pay Monies on Deposit to Abbot Kinney Company, et al., and Determining Title to Sprinkling System," which order has been filed and entered in Civil Order Book 38, page 735, under date of June 17th, 1946, and docketed on June 18th, 1946, do hereby appeal from the whole and each part of said Order of June 17, 1946, to the United States Circuit Court of Appeals for the Ninth Circuit pursuant to Section 24(a) of the Bankruptcy Act as amended, and pursuant to Federal Rules of Civil Procedure, Section 75(g) and General Order 36 in Bankruptcy.

Your petitioners pray that the proper record on appeal as provided under Federal Rule 75(g) of the Federal Rules of Civil [195] Procedure be docketed and that this appeal be heard and determined as provided by law.

Dated this 25th day of June, 1946.

LESLIE L. HEAP
D. M. KITZMILLER
COBB & UTLEY

By Francis B. Cobb

[Endorsed]: Filed & mailed copy to Grainger & Hunt
Jun. 26, 1946. [196]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 206 inclusive contain full, true and correct copies of Creditors' Petition; Creditors' First Amended Involuntary Petition; Answer of Alleged Bankrupt; Referee's Certificate on Petition for Review of Order in re Disposition of Money Held by Clerk of Court; Petition for Order to Show Cause; Order to Show Cause; Answer of Charles Brown to Petition and Order to Show Cause; Answer of E. A. Gerety to Petition and Order to Show Cause; Answer of William Harrah to Petition for Order to Show Cause; Objection of Charles Brown to Jurisdiction of this Court in re Order to Show Cause; Objection of E. A. Gerety to Jurisdiction of this Court in re Order to Show Cause; Petition for Review of Referee's Order; Bankrupt's Exhibits 1 to 8 inclusive; Brown's Exhibits 1 to 4 inclusive; Gerety's Exhibit 1; Petition in Intervention in Opposition to Amended Involuntary Petition; Notice of Motion on Petition to Intervene; Amended Answer of Alleged Bankrupt; Order of District Judge dated December 14, 1945; Motion for Dismissal and Notice of Hearing Thereon; Affidavit in Support of Motion to Dismiss; Report of Special Master on Involuntary Petition in Bankruptcy; Motion to Dismiss Involuntary Petition; Amended Stipulation and Order Approving Same; Cer-

tified Copy of Order Directing Payment of Money to the Clerk of the Court; Points and Authorities in Support of Motion to Intervene; Affidavit of Harold B. Pool; Order Permitting Bankrupt to File Amended Answer; Order of District Judge dated May 27, 1946; Order on Review from the Order of the Referee Directing Clerk of the Court to Pay Monies on Deposit to Abbot Kinney Company, et al. and Determining Title to Sprinkling System; Petition for Order Fixing Supersedeas Bond on Appeal; Order Fixing Cost and Supersedeas Bond; Supersedeas Bond on Appeal; Notice of Appeal; Designation of Record on Appeal; Stipulation and Order Extending Time within which to serve and file Designation of Additional Portions of Record on Appeal; Stipulation and Order re Record on Appeal and Appellants' Statement of Points on which they intend to rely on appeal which, together with original Reporter's Transcript of Hearings on July 24, 1945 to July 27, 1945, both inclusive, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$51.90 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 26 day of July, A. D. 1946.

(Seal)

EDMUND L. SMITH,

Clerk,

By Theodore Hocke,

Chief Deputy Clerk.

[Title of District Court and Cause.]

Before Hon. Benno M. Bring, Referee in Bankruptcy
In Bankruptcy, No. 43551—O'C.

REPORTER'S TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS IN RE ALLEGED BANK-
RUPT VERSUS CHARLES J. BROWN, E. A.
GERETY, WILLIAM HARRAH AND JOHN
HARRAH

Appearances:

For Petitioning Creditors: Nicholas and Davis, by
M. Philip Davis, Esq., 812 Banks-Huntley Building, 634
South Spring Street, Los Angeles, California.

For Alleged Bankrupt: Grainger & Hunt, by Kyle Z.
Grainger, Esq., 830 H. W. Hellman Building, 354 South
Spring Street, Los Angeles, California.

For Charles J. Brown: Francis B. Cobb, Esq., 506
L. A. Stock Exchange Office Building, 639 South Spring
Street, Los Angeles, California.

For Certain Creditors: Harold B. Pool, Esq., 810
South Spring Street, Los Angeles, California.

For E. A. Gerety: Don M. Kitzmiller, Esq., 610
Rowan Building, 458 South Spring Street, Los Angeles,
California.

For William Harrah: Leslie L. Heap, Esq., and O. S.
Vernon, Esq., 829 Citizens National Bank Building, 453
South Spring Street, Los Angeles, California.

Los Angeles, California. Tuesday, July 24, 1945.

10:00 O'Clock A. M. Session

The Referee: The Abbot Kinney Company?

Mr. Cobb: Ready for part of the group.

The Referee: Be seated. Some one wanted to get away?

Mr. Kinney: Yes, your Honor.

The Referee: In what capacity are you here, Mr. Kinney?

Mr. Kinney: As a witness.

The Referee: Who subpoenaed him?

Mr. Cobb: Mr. Grainger or Mr. Davis.

The Referee: I am sorry, I cannot excuse you until they arrive.

Mr. Cobb, you represent Mr. Charles Brown?

Mr. Cobb: Yes, your Honor, and also represent a creditor and stockholder and bondholder in connection with the motion to intervene.

The Referee: Is that before me?

Mr. Cobb: The motion was made yesterday, and Referee Dickson denied it. I am going to renew it this morning.

The Referee: Who represents Mr. Gerety?

Mr. Kitzmiller: Don Kitzmiller, your Honor.

The Referee: Mr. William Harrah?

Mr. Heap. I do, your Honor, Leslie L. Heap.

The Referee: John Harrah?

Mr. John Harrah: I don't care to be represented at all. [3*] I know no reason for being. I have no interest in it. I am subpoenaed here as a witness.

The Referee: Let us see what relief they ask against you. You understand what this matter is about, do you not, Mr. Harrah?

Mr. Harrah: Certainly, I understand.

The Referee: Do you claim any interest in this sprinkling system? Mr. John Harrah: None.

Mr. Cobb: Mr. Harrah is an attorney, your Honor.

The Referee: Yes.

Let us see, you are John Harrah?

Mr. John Harrah: Yes.

The Referee: And you now in open court disclaim any interest in this sprinkling system, Mr. Harrah?

Mr. Harrah: That's right. I never had any interest in it.

The Referee: Do you claim any interest whatsoever in this sum of \$30,000?

Mr. John Harrah: None whatever.

The Referee: Or in the \$7,500? I don't know whether that is going to be involved or not.

Mr. John Harrah: None whatever.

The Referee: Apparently we have to wait for Mr. Grainger. Is Mr. Davis coming? Does anybody know?

Mr. Cobb: They will probably come together. I wonder if [4] your Honor could read the petition for intervention and the motion in connection with the same, the points and authorities attached?

The Referee: All right, I will read it while we are waiting.

(A short recess.)

The Referee: Mr. Kinney has asked to be excused, gentlemen. Is there any objection?

Mr. Davis: I assume there will not be any objection if he is to be back here in an hour.

The Referee: Any objection?

Mr. Grainger: No. Your Honor, we asked the secretary in charge of your Honor's office to phone down, which I presume she did, explaining our delay in endeavoring to get these various orders in connection with the proceeding. Judge O'Connor signed an order referring to you as Master on the issues on the involuntary proceeding, and I understand that the Court will take care of the other end of the—

The Referee: Very well. All right, what matter do you want to take up first, gentlemen?

Mr. Davis: If your Honor please, the matter presently assigned for the purposes of hearing is the order to show cause.

The Referee: Yes?

Mr. Davis: I think that is the orderly procedure. We had arrived at that point yesterday. The other problems had been [5] thoroughly considered by Referee Dickson, and I assume we should go ahead with that phase of it.

The Referee: All right.

Mr. Cobb: At this time I would like to renew the objection that has been made in the form of a written objection and copy served on counsel to the jurisdiction of the Court to proceed on the order to show cause. And I likewise want to urge the motion to intervene. The question of jurisdiction, as your Honor well knows, can be raised at any time. And it goes to the heart of the whole proceeding here. It is based on the four grounds set up in the written objections. The first one, which I think is the fatal defect in the involuntary petition—

Mr. Grainger: May I interrupt here? I see that they are starting to argue those points on that. I think we first ought to clear the brush away as to whether the Court is going to proceed to rehear that which has been decided, in effect accomplishing a review without a review.

The Referee: All right, state your motion, please, Mr. Cobb; then we will see whether we will hear any argument on it. What is your motion, and on whose behalf do you make the motion?

Mr. Cobb: On behalf of a bondholder—and unfortunately my file has not arrived yet; I had to be in another court at 9:15, and it is on its way up—Mr. Pool, a creditor; Mr. Kinney, a stockholder. [6]

The Referee: Which Kinney?

Mr. Cobb: Carleton Kinney, that just left.

The Referee: Yes?

Mr. Cobb: And Mr. John Harrah, as a bondholder.

Mr. John Harrah: Director.

The Referee: Director? All right.

Mr. Cobb: This motion is made to intervene on the facts set up in the petition, which is there is no answer, affidavit, in objection—

The Referee: What is your motion?

Mr. Cobb: On the ground that the—

The Referee: What is your motion? What do you move?

Mr. Cobb: I move that we be allowed to intervene and oppose the involuntary petition and to set up the answer to the involuntary petition which is attached to the pleadings.

The Referee: Upon what grounds do you make the motion?

Mr. Cobb: On the ground that the corporation is not represented by a disinterested group; that Mr. Davis, the attorney for the petitioning creditor, is secretary, and his brother, who is an attorney, is the president and they have filed the answer on behalf of the company and at the same time are attorneys of record pressing an involuntary petition; and that the corporation has not been brought on for hearing and the original answer did not set up all of the defenses that should be set up to the involuntary petition. Mr. Grainger, since I filed this motion, has filed an amended [7] answer which I think sets up the defenses that we ask to be set up. But the—

The Referee: Let us not argue it. I just want your questions. Is this the same motion on which the notice of motion on a petition to intervene was filed July 19, 1945?

Mr. Cobb: Yes.

The Referee: It was set for hearing Monday, July 23, 1945, at 10 a.m. before Referee Dickson. Was it ruled on? Mr. Cobb: Yes.

The Referee: Your motion is denied. Is there any other motion?

Mr. Cobb: I have the objection to the jurisdiction of this Court to proceed on the order to show cause.

The Referee: You filed that in writing, did you?

Mr. Cobb: Yes, your Honor.

The Referee: Whom do you represent in this capacity?

Mr. Cobb: I represent Mr. Brown, your Honor.

Mr. Kitzmiller: Same objection on behalf of Mr. Gerety.

The Referee: The matter of the objection to the jurisdiction of this Court to proceed on the order to show cause, has that been ruled on?

Mr. Cobb: Yes, it was ruled on, your Honor.

The Referee: What was the ruling, sustained or overruled?

Mr. Grainger: It was overruled and directed to go to trial.

The Referee: The renewal of your objection, then, is [8] likewise overruled.

Mr. Cobb: I want to make it; I want to continue to make it. In other words, if this matter has to go up on a review, I don't want to be confronted with the task of taking a review from Referee Dickson's ruling down there and on the ruling just now denied. In other words, this is not a renewal; it is a continuing objection.

Mr. Kitzmiller: On behalf of Mr. E. A. Gerety I also make the same objection as to the jurisdiction of this Court.

The Referee: You also filed yours on July 23, 1945?

Mr. Kitzmiller: Yes.

The Referee: Was it ruled on?

Mr. Kitzmiller: It was ruled on, your Honor.

The Referee: Was it overruled?

Mr. Kitzmiller: Yes.

The Referee: Your renewed objection is likewise overruled. Is there any other motion?

Mr. Heap: I want to object to the jurisdiction of the Court on behalf of William Harrah. I do not find a written objection. As I explained, I came into this matter yesterday and am not thoroughly familiar with it yet.

The Referee: State your grounds of objection.

Mr. Heap: The grounds of the objection are that the corporation has not been adjudicated to be insolvent nor has it been found to be bankrupt. That is a **matter** which is set, as I understand, for tomorrow or the next day. And the [9] pleadings before the Court would indicate there is a serious question as to the insolvency of the corporation. I take the position that the insolvency should be first adjudicated; otherwise we are wasting the time of this Court. If tomorrow or the next day it should be found that the corporation is not insolvent and not bankrupt, then this matter should not be tried in the bankruptcy court.

The Referee: I understand that those are the same grounds of objection urged by Mr. Cobb in his objection to the jurisdiction? Mr. Heap: Yes, sir.

The Referee: And those were specifically ruled on by Referee Dickson?

Mr. Cobb: I further objected, your Honor, that there wasn't any receiver and that the debtor is not permitted to bring on an order to show cause to try title or quiet title, and on the further ground that there was a stipulation that this controversy be postponed until there was a consideration of—

The Referee: The rulings of Referee Dickson will stand. Is there anything else by way of preliminary?

(No answer.)

Now we have before us the petition filed in this matter on July 7, 1945, by the alleged bankrupt, the order to show cause against Charles Brown, E. A. Gerety, William Harrah, and John Harrah, with respect to the ownership of a certain [10] sprinkling system. Mr. John Harrah

is present in open court in propria persona, and he has in the record disclaimed any interest in the sprinkling system or in the sum of \$30,000 which is mentioned in this petition or in the sum of \$7,500 which is also mentioned—if that item should be a part of the subject matter of this litigation.

Is that correct, Mr. John Harrah?

Mr. John Harrah: That is correct, your Honor.

The Referee: The other respondents are all represented by counsel, and the alleged bankrupt is represented by counsel. Let us see, gentlemen, what matters, if any, are either admitted by the pleadings or may be stipulated to. Will you please take your copies of the petition and we will go down it paragraph by paragraph as quickly as we can and see what issues remain.

May it be stipulated that the allegations of paragraph I on page 1 are correct? You do not have a copy, Mr. Cobb? Mr. Cobb: No, your Honor.

The Referee: Will you sit down with some one else? Make yourselves comfortable now. Are you all ready, gentlemen? It is stipulated that the allegations of paragraph I on page 1 are true?

Mr. Cobb: No, your Honor, we object to that portion of the paragraph that says that an involuntary petition in bankruptcy has been filed. We claim that it does not constitute an involuntary petition because there are no creditors— [11]

The Referee: Do you stipulate that on October 21, 1944, a petition was filed?

Mr. Cobb: Yes, your Honor.

The Referee: Does any one else have an objection to that paragraph?

Mr. Kitzmiller: The same objection with regard to the involuntary—

The Referee: That is a matter of construction as to whether or not it is in fact a petition in involuntary bankruptcy. But you do stipulate that a paper captioned "Involuntary Petition in Bankruptcy" was filed in this matter? Is that correct?

Mr. Kitzmiller: Correct.

The Referee: It is stipulated the allegations in paragraph II are correct? Mr. Cobb: Yes.

Mr. Davis: Yes.

Mr. Kitzmiller: Yes.

The Referee: It is stipulated that the allegations of paragraph III are correct?

Mr. Davis: Yes.

Mr. Cobb: Yes.

Mr. Heap: Except as to the price alleged there. I understand that is not correct. They allege \$400,000.

The Referee: What do you say it is?

Mr. Heap: I am informed it is a little in excess of [12] \$200,000.

The Referee: Do you have the contract, gentlemen?

Mr. Heap: I do not.

Mr. Davis: Mr. Mapes, do you have the original contracts or the modified—

The Referee: Who has it?

Mr. Davis: I guess the Company has it, one copy; and does Mr. Brown have his copy?

The Referee: Why don't we put it, the contract, in evidence, gentlemen? Have you any true copies here, anybody? Mr. Cobb: I will have in a minute.

The Referee: Paragraph IV. Will it be stipulated that Charles Brown, E. A. Gerety, and William Harrah claim to hold and own the seller's interest in said sprinkling system?

Mr. Cobb: It will be so stipulated.

The Referee: The remaining allegation, of course, of that paragraph cannot be stipulated to. That is the controversial point here, that the said claim is without foundation.

Is it stipulated that the allegations of paragraph V are correct, that John Harrah has been a director of said Abbot Kinney Company ever since the 23rd day of December, 1937? Mr. Cobb: Yes.

Mr. Grainger: Yes.

Mr. Heap: Yes.

Mr. Kitzmiller: Yes.

The Referee: Is it stipulated that the allegations of [13] paragraph VI are correct, that E. A. Gerety was an employee of Abbot Kinney Company for many years and from 1937 to December 13, 1944, was its general manager?

Mr. Davis: I think, your Honor, Mr. Gerety has been general manager for substantially longer than that, and that he was a receiver under State court proceedings prior to that time from 1932 to 1937.

Is that right, Mr. Gerety? I think we had better develop that on testimony—

The Referee: All right. Are the allegations of paragraph VII agreed to?

Mr. Cobb: Well, we deny that Charles Brown is associated with John Harrah and William Harrah as a business associate.

The Referee: All right, we will place that paragraph in issue, then.

What about paragraph VIII?

Mr. Cobb: We admit that.

Mr. Kitzmiller: We admit that.

The Referee: Is there any objection to that paragraph on the part of anybody?

Mr. Davis: I think Mr. John Harrah will state that he did not become a member of the Executive Committee until about 1940.

Isn't that correct, Mr. Harrah?

Mr. John Harrah: I don't remember the exact dates.

Mr. Davis: This states that on the 6th day of April, 1938, by action of the Board of Directors of said corporation [14] an Executive Committee was created to be composed of three members. That from the 16th day of November, 1938, until the 13th day of November, 1944, the members of said Executive Committee were John Harrah, Carleton Kinney, and Alfred Newton.

Mr. John Harrah: I think about five years—four years.

Mr. Davis: That is substantially correct, and for all the purposes of this proceeding it is unimportant. We can stipulate that after 1940—

The Referee: What about the allegations of paragraph IX?

Mr. Kitzmiller: Those allegations are denied by Mr. Gerety on—

The Referee: All right.

Mr. Davis: They were admitted by Mr. Harrah and Brown under the 21-A. I think the Court is interested in the stipulation. I believe the facts show that he definite-

ly was and he so admits. If you want to put it in issue, I don't care.

Mr. Kitzmiller: I was not here in the other proceeding. If there was such an admission—

Mr. Cobb: There isn't any doubt that he was agent and attorney for his son.

The Referee: Put it in issue. Now paragraph X? Is it stipulated that during January, 1943, said F. F. Cruickshank offered to accept the sum of \$10,000 in full settlement upon its contract? [15]

Mr. Cobb: No, your Honor. There were some negotiations, but we cannot stipulate—

The Referee: All right, we will have to put the whole paragraph—wait a minute: Is it stipulated that in May, 1944, that Cruickshank offered to accept \$10,000 in full settlement upon its contract?

Mr. Cobb: No, it is not, your Honor.

Mr. Kitzmiller: No. It is stipulated there was the sum of \$137,000 owing.

The Referee: That is a small matter. We will put the whole paragraph in issue.

Mr. Cobb: There are two paragraphs in X, notice, your Honor.

The Referee: There are two X's?

Mr. Cobb: Yes.

The Referee: All right, the first paragraph X is in issue.

Relating to the second paragraph X, on page 4, is it stipulated that Charles Brown claims to have purchased the contract for the sum of \$15,000?

Mr. Cobb: Charles Brown and Mr. Gerety purchased it together. The legal title was taken in the name of Charles Brown.

The Referee: All right, we had better leave that in issue, then. Is it stipulated that on November 25, 1944, the bankrupt received a letter from William Harrah in which he [16] stated he had purchased a one-third interest in the contract?

Mr. Cobb: I think that is correct. I have not seen the letter, but—

The Referee: All right. We will put the letter in evidence.

Is it stipulated that on the 7th of June, 1944, at a meeting of the Executive Committee at which John Harrah and Carleton Kinney were present and Alfred Newton was absent, it was ordered that \$7,500 be paid by the corporation on the contract of Charles Brown and was so paid? Mr. Cobb: So stipulated.

Mr. Davis: So stipulated.

Mr. Kitzmiller: I will—

The Referee: Is it so stipulated, Mr. Heap?

Mr. Heap: I hesitate to stipulate to that, your Honor, on the part of William Harrah for the reason that I don't know what the fact is. These other gentlemen do, but I don't know.

The Referee: I am sorry, counsel, but this is a court of expedience; and you should acquaint yourself with the facts of the case before you attempt to appear for anybody.

Mr. Heap. My client was served by mail in Reno, Nevada, just a few days ago. I am not going to take up any of the time of the Court on the point. I will co-

operate. I will find out from the gentlemen here on that point, and I can assure you that I am not going to waste any of your time. [17]

The Referee: Is it stipulated that on the 7th day of November, 1944, at a meeting of the Executive Committee, at which meeting Carleton Kinney and John Harrah were present and Alfred Newton was absent, it was directed that the sum of \$30,000 be paid to Charles Brown on the sprinkling system contract and that the said sum was paid?

Mr. Kitzmiller: Yes, except that there was a credit of \$50,000 to be received by the corporation in connection with the \$30,000 payment.

The Referee: Well, we had better leave that open, then.

I suppose paragraph XI will be in issue as well as paragraph XII and likewise paragraph XIII and also paragraph XIV?

Mr. Kitzmiller: That was XIII instead of XV, was it not, your Honor?

The Referee: Did I say XV?

Mr. Kitzmiller: I thought so.

The Referee: Well, XI, XII, XIII, XIV will be controversial.

Paragraph XV, is that stipulated to?

Mr. Cobb: Yes.

Mr. Kitzmiller: Yes.

Mr. Heap: Yes.

The Referee: I guess that is about all you can stipulate to.

All right, gentlemen, please proceed with the evidence; and do not offer any evidence on any of the matters

agreed to, [18] except that I do believe it would be advisable to have a true copy of the Cruickshank contract in evidence.

Mr. Davis: I assume this is an exact copy, your Honor. I have not had a chance to examine it. But we could introduce it—

The Referee: Put it in evidence subject to correction, if necessary.

Mr. Davis: There are three instruments, your Honor.

The Referee: You offer it as one exhibit?

Mr. Davis: It is offered as one exhibit.

The Referee: It will be marked Bankrupt's Exhibit 1.

Mr. Davis: I might state in the absence of Mr. Grainger, your Honor, that although I am representing the petitioning creditors and Mr. Grainger is representing the alleged bankrupt, the petitioning creditors and the alleged bankrupt in this matter are joining to bring this money back into the corporation, and that I have been especially associated in this proceeding with the alleged bankrupt as counsel with Grainger and Hunt for the bankrupt—

The Referee: All right.

Mr. Davis: —and will help carry the proceedings forward. I am wondering if your Honor would care for a statement of the position of the alleged bankrupt and the petitioning creditors in this matter or if you feel that the petition itself—

The Referee: I have read the petition, and I think that [19] sets forth the issues and the substance.

Mr. Davis: Thank you, your Honor. We will call Mr. Charles Brown.

CHARLES J. BROWN,

called as a witness on behalf of the petitioning creditors,
being first duly sworn, testified as follows:

The Referee: Is your name Charles Brown?

Mr. Brown: Yes, sir.

The Referee: And you are the Charles Brown who
is named in this case? Mr. Brown: I am.

The Referee: Proceed, Mr. Davis.

Direct Examination.

By Mr. Davis:

Q. Where do you reside, Mr. Brown?

A. In Venice.

Q. How long have you resided in Venice?

A. Since 1919.

Q. Are you acquainted with John Harrah?

A. I am.

Q. How long have you known John Harrah?

A. Oh, about twenty odd years.

Q. Have you ever been in business with John Harrah?

A. No, I haven't. [20]

Q. Have you ever been in business with William
Harrah? A. No, I haven't.

Q. How well have you known John Harrah?

A. I should say very intimately.

Q. How well have you known William Harrah?

A. Well, I have known William Harrah ever since
he has been a young boy growing up.

Q. Who is William Harrah?

A. The son of John Harrah.

Q. Do you know what business William Harrah is in?

A. Presently engaged in business in Reno, Nevada.

(Testimony of Charles J. Brown)

Q. Was he engaged in business at the Venice Pier to your knowledge?

A. Some time in the past he had been.

Q. And who is John Harrah in relation to William Harrah, so far as business is concerned, if you know?

A. Why, I think John Harrah kind of supervised William Harrah.

Mr. Heap: Just a minute. I object to that and move that the answer be stricken as being purely a conclusion.

The Referee: Motion granted. It may go out.

Mr. Davis: Q. Whenever you have had any dealings with William Harrah, whom have you contacted to carry out that business in Venice?

A. Well, I contacted William Harrah.

Q. Have you contacted John Harrah in regard to it? [21]

A. He evidently either advised Mr. William Harrah what to do or how to do it, one thing and another.

Q. You have been referred to John Harrah by William Harrah? A. I have.

Q. To carry on William Harrah's business in Venice?

A. No, just in regard to any deal we had between William Harrah and myself.

Q. And you always referred those matters to John Harrah? A. No, to William.

Q. When William Harrah referred you to John Harrah in connection with any business deal, what did he state to you?

A. I guess that was the conclusion I come to.

(Testimony of Charles J. Brown)

Q. And how long to your knowledge has John Harrah been so representing William Harrah in the Venice activities?

A. As long as William Harrah conducted games of any sort in Venice, John Harrah, being the best man posted on the operation of those games, he naturally sought his father's advice on how to conduct those games.

Q. Now have you ever done any work for William Harrah? A. Yes, I have.

Q. What has that work consisted of?

A. Well, I worked different times for William Harrah.

Q. When did you first start doing work for William Harrah?

A. Well, I don't remember just exactly.

Q. It has been over a period of many years, has it not? [22]

A. Different times I have done work for him.

Q. And you and Mr. William Harrah have been very close in various business activities, have you not?

A. Most of the time as I was an employee of William Harrah, different times.

Q. What was your first employment with William Harrah? A. I really don't remember.

Q. Well, how long ago would you say that first employment took place?

A. Oh, I can't say; quite a few years ago.

Q. Ten or fifteen years ago?

A. Oh, I don't know that it was that long. I can't just exactly say. I think—I think—oh, maybe ten years ago. I couldn't just exactly say.

(Testimony of Charles J. Brown)

Q. And has that employment continued rather regularly down to the present time? A. No, it hasn't.

Q. Are you doing some work for William Harrah at the present moment? A. I am not.

Q. When would you say was the last work you did for William Harrah?

A. Oh, I can't just remember. It was quite some time ago. When you asked me that there—I did work in a liquor store for a few hours a day.

Q. Oh, yes. When was that? [23]

A. That was—that was last—oh, a year or so ago.

Q. Was that last year, 1944?

A. That was up to the time he sold out that liquor store. I only worked a few hours relief.

Q. And what did you do there in the liquor store?

A. What did I do?

Q. Yes.

A. Well, I usually opened it up and received merchandise.

Q. Would you collect the moneys at night or would that be collected by Mr. John Harrah?

A. It would be collected by Mr. John Harrah.

Q. Then did you purchase the inventory for the liquor store?

A. No, I received most of the merchandise.

Q. Now Mr. William—

A. That is, I was only there a few hours; and during the time I was there I automatically received the merchandise.

Q. And did you purchase other items for Mr. William Harrah when he would ask you to? A. I did.

(Testimony of Charles J. Brown)

Q. What other items were there that you purchased for him?

A. Well, little incidentals and things that were connected with the business.

Q. You mean with the liquor business?

A. Yes. [24]

Q. Was there any other business that you purchased things for him?

A. Why, yes, yes; later on when I was in business over there for myself, which I am—in the Bridgo game—I bought merchandise for him; and I sometimes borrowed stuff off of him and paid it back just the same as I have with Robbins and other people.

Q. Where would you borrow that stuff? Where would he have it located?

A. If I bought some of the merchandise, automatically I might have taken some of it and bought a little bit for myself at the same time that I may have purchased it for him.

Q. In other words, you may send some to him and you may keep some; but you did not distinguish as to whether it was—

A. I always did. I paid for mine. Using similar things—or I have even bought merchandise off of Robbins and Robbins bought stuff off of me—just temporarily.

Q. Yes. And you would temporarily just take it and—

A. No, no, I didn't just temporarily take it. A notation was made, and it was replaced.

(Testimony of Charles J. Brown)

Q. But you had full control—

A. No, I didn't.

Q. —as to how that was done?

A. I had no control over it at all. I just automatically used some of it, and that was the answer to it.

Q. I see, just automatically did it. [25]

A. Replaced it.

Q. Then after you would get his merchandise, would you send some of it up to **Reno**?

A. If I had any sent to Reno, I had it sent from the source of supply.

Q. Whenever you ordered anything for Reno, you would send it direct to Reno?

A. That's right, instruct the person who happened to make the stuff.

Q. You would have him ship it direct? A. Yes.

Q. So that it never came to you? A. Yes.

Q. And this stuff you just borrowed from Mr. Harrah, how was it that that came to you?

A. How was that?

Q. This stuff you say you automatically borrowed from Mr. Harrah, how would that stuff come to you so that you could automatically borrow it?

A. Sometimes they come from Mr. Robbins or somebody else where we got merchandise.

Q. I am talking about Mr. Harrah.

A. That is what I am talking about. This is a market where you can't always get stuff. We all down there have a little arrangement among ourselves, there's a little reciprocity: we borrow and take and pay back when—
[26]

(Testimony of Charles J. Brown)

Q. Mr. Harrah was not operating a game at Venice—

A. I am explaining the situation.

Q. —so you could not borrow anything from Mr. Harrah unless you had it shipped to you to be re-shipped to Mr. Harrah, could you?

A. Most of the stuff Mr. Harrah ordered in Reno was directly shipped to him—

Q. Yes.

A. —and I believe there was one shipment that came in that was re-shipped.

Q. That was re-shipped? A. Yes.

Q. Mr. Harrah would call you on occasions?

A. I have talked to him a number of times on the 'phone.

Q. And he would say what, "Charley, will you go down and buy me some merchandise?" A. Yes.

Q. And what would you say to him?

A. I would say, "I will see what I can do."

Q. Then you would go look for it?

A. I would try to make an effort through various contacts we had and try to get the merchandise.

Q. How many times a week would you say you would be called upon to do that type of work?

A. I might do it once or twice a week, and I may not do it again in two months. [27]

Q. It all depended on the needs of Mr. William Harrah? A. Yes.

Q. That contact, that manner of doing business, continued over how long a period of time, would you say? When did that first start, that type of—

A. That I couldn't say.

(Testimony of Charles J. Brown)

Q. Well, would you say it started about when Mr. Harrah opened his place in Reno?

A. Oh, at different times.

Q. Was that about when it started, though?

A. Well, most of the things that I have sent up there or bought—or had bought, that I paid for—was since the acute shortage. Everything else prior to that time was automatically ordered from that end, where they could get it. And there being shortages, we had to shop for merchandise.

Q. So you go around and shop?

A. I didn't go around at all. I simply used the telephone to various places that it was possible to get that particular merchandise.

Q. In other words, whatever was necessary to get that merchandise you would do?

A. That's right.

Q. That, I assume, is continuing up to the present time?

A. Yes, I think I sent him a couple of white shirts a couple of weeks ago.

Q. Have you ever been employed by the Abbot Kinney [28] Company?

A. I have.

Q. When were you employed by the Abbot Kinney Company?

A. I think it was in '43. Mr. Gerety could answer that better than myself, I think. I was discharged there a year ago last April, I think.

Q. How long did you work for the Abbot Kinney Company?

A. I worked on a commission basis on collections at the time that Mr. Burns left. I don't know the exact date.

(Testimony of Charles J. Brown)

Q. Did you have any source of income other than from your Abbot Kinney Company commissions during that period of time?

Mr. Cobb: We object to that on the ground that that is personal, has no bearing on the issues of this case.

The Referee: Overruled.

You may answer.

The Witness: I will be very glad to answer that question, because I think when I first started to work for the Kinney Company I earned at the rate of about \$40 a month. So it would hardly keep me. I think that can be verified by Mr. Mapes over there (indicating), who was the bookkeeper.

Mr. Davis: Q. What other source of income did you have at that time, Mr. Brown?

A. I just shortly before that sold out a business in San Diego.

Q. What business was that? [29]

A. I operated a large service station and wash rack.

Q. Do you recall what you received for that?

Mr. Cobb: We object to that on the ground that that is incompetent, irrelevant, immaterial as to any of the issues here and is an attempt to inquire into the man's personal affairs.

The Referee: Overruled.

Answer the question.

Mr. Davis: Q. Answer the question.

A. What did you ask?

Q. Do you recall what you received for that—

A. I was in business for myself down there.

(Testimony of Charles J. Brown)

Q. And what did you receive when you sold that business? A. What did I receive?

Q. Yes. How much money did you get for that business?

A. I think I sold out that equipment around—a little between two thousand and twenty-five hundred dollars.

Q. Between two thousand and twenty-five hundred dollars? A. Yes. That was for the equipment.

Q. That was what you received for that business, was it, when you sold it?

A. That's right. That was for the equipment, I think—as I remember.

Q. Did you receive any other money for good-will or anything like that, or was that the total amount?

A. I think that was the final settlement. [30]

Q. Was that your source of income during the time you were working for Abbot Kinney Company, too?

A. I alway had money. I always had a few dollars.

Q. How many dollars did you have?

A. I always had quite a few, maybe four or five or six thousand dollars.

Q. Four or five or six thousands dollars?

A. Yes.

Q. Where did you do your banking?

A. I done my banking in the San Diego Trust and Savings.

Q. How long did you bank at the San Diego Trust and Savings?

Mr. Cobb: To which we object, your Honor. It is wholly immaterial, far afield, immaterial to any of the issues of this case.

(Testimony of Charles J. Brown)

The Referee: What is the relevancy of this testimony, Mr. Davis?

Mr. Davis: I might state, your Honor, that the evidence, as it will develop—this particular point I haven't had; but the evidence will show, I am firmly convinced—that Mr. Brown had no substantial source of income; that all of a sudden he becomes very affluent and can spend all kinds of money and this developed only after an involuntary petition in bankruptcy had been filed against John Harrah—John Harrah failed to get a discharge in bankruptcy and there is an outstanding obligation against him of _____ and from [31] that date John Harrah did business through Charley Brown and through his son William Harrah; and this whole transaction is a machination of John Harrah in control of the Executive Committee of the Abbot Kinney Company, one of the directors; and that he and Eddie Gerety and Charles Brown and William Harrah conspired to defraud the Company of this money.

Mr. Cobb: I don't want counsel's false remark to indicate that that was brought out on any 21-A.

Mr. Davis: He indicated that—

The Referee: Gentlemen, remember the 21-A examination is not in this record. The objection is overruled.

Mr. Davis: Might we have that question?

The Referee: Please read the question, Mr. Reporter.

(The reporter read the following question: How long did you bank at the San Diego Trust and Savings?)

The Witness: For the full length of time that I operated in San Diego.

(Testimony of Charles J. Brown)

Mr. Davis: Q. How long was that, Mr. Brown?

A. Oh, I don't know. I think it was 1936 when I left there.

Q. 1936. And what did you do after 1936?

A. I came back to Venice, and my bank account then I opened—oh, yes, I had—during the time I was in San Diego I had a bank account in the Security-First National at Venice.

Q. You had a bank account at both the Security-First [32] National Bank in Venice and—what was the name of the bank in San Diego? A. That's right.

Q. What was the name of the bank in San Diego?

A. I just told you.

Mr. Davis: And what was that, Mr. Reporter?

The Reporter: The San Diego Trust and Savings.

Mr. Davis: Q. Now you returned to Venice in 1936?

A. I am not exactly positive. I think that it was about then.

Q. And then what did you do when you came back to Venice? Is that the time you started working for William Harrah?

A. I can't just exactly think about what happened after that. I don't remember.

Q. You don't remember?

A. I don't believe I did anything right after that for the time being.

Q. In other words, you loafed for quite a while after that, did you not?

A. Not necessarily. I was always active in one thing or another.

(Testimony of Charles J. Brown)

Q. Did you have any other source of income?

A. I always had money to carry me along. I was never on relief. I always had enough to get along and pay my obligations and not enter into debt.

Q. How much would you say your income was in, say, 1936? [33] A. I forget exactly what it was.

Q. Would you say it was a thousand dollars in 1936?

A. I think you are being—putting it rather low, because even while I was in San Diego I still maintained my home in Venice.

Q. Were you married? A. Yes.

Q. Have you children? A. Yes.

Q. Are they living with you? A. No, married.

Q. What did you say your income in 1936 was?

A. I just can't remember.

Q. Do you file income tax returns? A. I do.

Q. Did you in 1936? A. I think I did.

Q. Do you still have copies of your 1936 income tax return? A. I think I have, I am not sure.

Q. Could you produce those income tax returns if you were so instructed by the Court to do?

A. I don't know whether I could or not.

Q. How about your 1937 income? What income did you have then?

Mr. Cobb: We object on the ground that that is entirely [34] too remote, your Honor. This transaction occurred in 1944.

The Referee: Overruled. Go ahead.

The Witness: I don't know whether I have got those old papers or not.

(Testimony of Charles J. Brown)

Mr. Davis: Q. What income did you have in 1937?

A. I don't know whether I had anything or not. I can't remember. I am just telling you I don't remember exactly what took place in 1937.

Q. How much income did you have in 1938?

A. I don't remember.

Q. Well, would you say you had \$500 income in 1938? A. Oh, I think I had more than that.

Q. Would you say that you had a thousand dollars in 1938? A. Yes, I had at least about \$3500.

Q. Around \$3500. What was your source of income in 1938, Mr. Brown?

A. I don't know. I can't place—I can't place dates with operations.

Q. What businesses were you in in Venice since 1936 and before you started getting these leases from Abbot Kinney Company? A. I don't know.

Q. You don't know that you were in any businesses around there?

A. Let's see, I would have to refresh my memory on those things. I haven't thought about what I did over those periods [36] of time.

Q. Do you recall any business at all that you were in in 1936 at the time you first got your lease, your first lease, from Abbot Kinney Company?

A. At the time I got my first lease from the Abbot Kinney Company, I think that was in—I think that was in October. I forget, I have to refresh—I would have to refresh my memory on some of those things.

(Testimony of Charles J. Brown)

Q. Up until the time you got your first lease with Abbot Kinney Company, when you returned to Venice, what business were you in, if any?

A. Well, I will have to refresh my memory.

Q. That is what I am trying to help you do.

A. I am doing the best I can. I can't remember just exactly what was the first one.

Q. Just tell me what business you were in during the period from 1936 up until the time you got the first lease from Abbot Kinney Company.

Mr. Cobb: When did you say the first lease from Abbot Kinney Company was?

The Referee: Let us establish that fact.

Q. When did you get your first lease from the Abbot Kinney Company?

A. I think the first lease I got from the Abbot Kinney Company—well, when I first got the lease over there on the Robbins Building. [36]

Mr. Davis: Q. Was that your first lease with the Abbot Kinney Company, the Robbins Building lease?

A. Wait a minute. Prior to that I had the lease on the game at the Plaza Building.

Q. Was that from the Abbot Kinney Company direct; or was that from William or John Harrah or the Plaza Building Company, whatever they called it?

A. I leased the fixtures in the old Plaza Building.

Q. Whom did you lease those from?

A. It was the property of William Harrah, and I paid him a rental on that—

Q. Yes. A. —when I operated over there—

Q. What date was that?

(Testimony of Charles J. Brown)

Mr. Cobb: Don't interrupt him. Let him finish that phase of the answer.

The Witness: Then I was closed up over there. Then my next operation was when I leased the Robbins Building through making arrangements with Harry Robbins for the fixtures. And we moved part of the fixtures of the old Plaza game into the Robbins Building.

Mr. Davis: Q. Did you rent those fixtures?

A. Yes, I still pay Harry Robbins a rent on the fixtures.

Q. Do you still pay William Harrah a rental on the fixtures? A. No. [37]

Q. What happened to those fixtures?

A. I purchased those.

Q. When did you purchase those?

A. At the time I moved over there, shortly before that,—there was a period of time there—there was a period of time when the fixtures were—we were settling and making arrangements to go over in there—that I purchased those fixtures from that—in fact it was the center section of the old game that was in there. And then we moved that over there. And I think I got that permit—I think it was in October.

Q. What year? A. I think it was 1943.

Q. In October of 1943—

A. I am not quite positive, but I think that's about the time. I am trying to fix about that time.

Q. So that that was the first lease, then, in October of 1943, that you had with the Abbot Kinney Company?

A. Well, now, I am not so sure. I don't know whether I got the lease—I think I got the lease on the

(Testimony of Charles J. Brown)

Slide around the 4th of July, around in July of '43. I am not quite sure, but I think that was it, because I opened up after that length of time—

Q. Are you referring to the Bamboo Slide?

A. Yes.

Q. And you believe the Bamboo Slide lease was the first [38] one you got from the Abbot Kinney Company?

A. No, no, I opened the other—I think that was in July.

Q. Which was in July, Mr. Brown?

A. I just can't be real truthful to you and tell you the honest God's truth.

Q. To the best of your recollection your first lease with the Abbot Kinney Company started about July of 1943?

A. I think that was about it.

Q. Now you had a lease, you say, on the Plaza Building game, that game in the Plaza Building?

A. The Robbins Building?

Q. Your first lease with William Harrah, as I understand it, was in the Plaza Building?

A. Yes, I had a lease on that place temporarily.

Q. How long did you operate that?

A. That I don't know just exactly how long I did operate there. I wasn't very successful.

Q. You did not make any money out of that, did you, Mr. Brown?

A. I don't know—I made a few dollars, yes.

Q. How much did you make, enough to eat three times a day; or did you—

A. Did I eat like you do?

(Testimony of Charles J. Brown)

Q. Did you make enough out of that operation to eat like I do? [39] A. I am positive I do.

Q. How much would you say you made during that period, the period of that lease from William Harrah?

A. I really couldn't tell you.

Q. How long did you operate?

A. I can't just exactly tell you there. I would have to get the records from the Police Commission.

Q. Do you keep personal records on that?

A. I think I have.

Q. How long did you operate, do you recall, Mr. Brown?

A. Well, as long as I have been around there and operating, we have been opened and closed a number of times.

Q. I am talking about this particular lease that you claim you had with Mr. Harrah. How long did you operate that game?

A. I forget the exact length of time.

Q. And you don't remember how much money you made, but you don't think it was very much?

A. I made a few dollars, always made a few dollars.

Q. You mean ten dollars a day net to you or—

A. Well, I never did think about ten dollars a day. We usually pay most of our help \$70 a week, from that on up to \$125.

Q. I realize that. That is why I am trying to find out how much you made during that period of time.

A. Well, I had quite a little legal difficulties; and I [40] spent considerable money with attorneys.

(Testimony of Charles J. Brown)

Q. So that by the time you got through you did not end up—

A. There was always something left. You can't chop wood without getting kindling.

Q. How much kindling would you say you had left, Mr. Brown, as the result of your—

A. I really couldn't say.

Q. Did you have \$500 left?

A. I always had a few dollars, Mr. Davis. It seems to me you are trying to say that I was destitute and never had nothing. I always had money. I had money ever since I came to Venice. When I came to Venice, I think I had \$25,000 in the bank. I had money in the—

The Referee: Answer the question.

Mr. Kitzmiller: When he first came to Venice, he had \$25,000 in one account.

The Referee: Go ahead.

The Witness: I have always—I have been active all my life. I am 64 years old. I have built buildings, I have built houses, I have done something of everything. I have been always active in one thing or another. I was President of the Board of Trustees of the City of Venice. And I think during that time I always spent considerable money. I've always moved here and there and always paid my own way.

Mr. Davis: Q. When did you say you first came to Venice? [41] That was back when?

A. I think I got there in November, 1919, after the World War.

(Testimony of Charles J. Brown)

Q. After that—

A. You want to go into prior to that time? I owned the biggest wholesale house in the San Joaquin Valley.

Q. You arrived at Venice in 1919 with about \$25,000?

A. I think that was the first deposit I made. I hadn't had a final settlement on things I had—

Q. Did you lose that money?

A. Oh, no. I invested it and went along. I was very active in Venice. I think shortly after I got there I built ten houses. I built a place for the Atlantic and Pacific.

Q. How much were you worth in 1936, when you came back to Venice?

Mr. Cobb: We object to that, your Honor. It is not the best evidence and calls for a conclusion and is not an issue involved in this case. In other words, they go out and try to quiet title and to rely on the weaknesses of somebody else's title and try to prove how much they were worth nine or ten years ago. At least I think that, until there is some foundation other than Mr. Davis' wild statements that Mr. Brown was destitute and had to get the money from some one else, the Court should have some limitation on going into a man's personal affairs. This man is not in bankruptcy. He is just a defendant here, and I think Mr. Davis will resent [42] later on when we put him on the stand and start going into his financial affairs. If we are going to play under that rule, I want that understood, that I want to go into Mr. Davis' affairs just the same as he is going into Mr. Brown's.

(Testimony of Charles J. Brown)

The Referee: Overruled. The Court will rule on the objections as they come up.

Mr. Davis: Q. Will you answer that question?

A. I don't know what the question was.

Q. How much were you worth in 1936, when you arrived back in Venice?

A. Oh, anywhere between five and eight thousand dollars.

Q. Five and eight thousand dollars cash? That was your total assets?

A. I wouldn't say they were my total assets.

Q. Let us just get a list of what you had in 1936.

A. Well, I've had that—most of it in cash.

Q. You had most of it in cash? A. Yes.

Q. And those were in those two bank accounts you were talking about? A. I had a safe deposit—

Q. Where was that safe deposit—

A. —in the Security-First National.

Q. In Venice? A. Yes.

Q. How much did you have in that safe deposit box? Did [43] you have cash in that?

A. I always had cash in there. I couldn't say the exact amount—no more than I could tell you the exact amount I have got in there now.

Q. Now from 1936, then, until June of 1943 you carried on no business, as I understand it, other than this one— A. What was that now?

Q. From—I will withdraw that—from July, 1936, when you returned to Venice, you do not remember any business or any source of income that you had up until

(Testimony of Charles J. Brown)

the time you took your lease with William Harrah on the Plaza Building; is that correct?

A. Oh, I think I made a few dollars and one thing and another, bought a few things and sold them. I had previously been in the real estate business.

Q. But you don't remember any of those deals? You don't remember any business that you were in?

A. Just offhand I just simply can't remember.

Q. And the deal you had with William Harrah was not profitable, according to your testimony?

A. Yes, I made a few dollars there. I told you that.

Q. Now you say you have known John Harrah for 25 years?

A. Thereabouts.

Q. How long have you known Eddie Gerety?

A. Well, I have known Eddie Gerety—Venice is a very small town. It is practically a one-block town. You can walk [44] up and down, and you are sure to meet anybody. I have known Eddie Gerety ever since he has been a young man.

Q. Going back for a moment, did you have access to any safe of John Harrah in his office in Venice there?

A. Yes.

Q. You had access to John Harrah's safe?

A. He used to lock me up at night and take it.

Q. Did you have the—

A. Combination? I did.

Q. And you had access to it?

A. That's right, and never stole a cent of it.

Q. And you could go in and take that money out and deal with it as you saw fit?

A. The man trusted me, and we always had to have change and one thing and another; and I made up what-

(Testimony of Charles J. Brown)

ever it happened to be—or if they asked me to cash checks or anything like that, I automatically cashed them and put the check in and took the cash out. That was the process of conducting business while I was there. I paid small bills like beer and things like that. I took the cash out and put the receipt in. In fact, they wouldn't leave it unless you did pay them.

Q. And you would just go in and take out money?

A. Just take and throw it away, I suppose.

Q. And you had free access to the safe?

A. Yes, spend it and do anything I wanted to do with it, I guess. But I usually paid bills and put a receipt in so [45] that it was accountable to him at the end of the day.

Q. That was the way you had of doing business?

A. That was what I was paid to do.

Q. And how much a month did you receive for doing that, Mr. Brown?

A. I spent about a half a day there, and I think I got \$40 a week. I only put in part time, a few hours a day.

Q. Do you recall your testimony under 21-A proceedings when I asked you the question "Have you ever just gone into the same and taken money out" and you answered "No"?

A. I don't recall that; and if I did make such a statement, I want to withdraw it at this time.

Q. Do you know what position John Harrah holds with the Abbot Kinney Company?

A. He's a director.

(Testimony of Charles J. Brown)

Q. And do you know of your own knowledge how long he has been a director?

A. I heard him testify this morning—or yesterday, some time around—

Q. You knew of your own knowledge that he was a director in 1940, too, did you not?

A. Yes, I did.

Q. And you also know that since that time he has been a director of the Abbott Kinney Company?

A. I do.

Q. And you also know that he was a member of the [46] Executive Committee of the Abbot Kinney Company since 1942?

A. Yes.

Q. And you knew that he was a member of that committee up until about December of 1944?

A. If you have fixed the date, that's correct.

Q. You knew that Eddie Gerety was the manager of Abbot Kinney Company, did you not?

A. Yes, conducted quite a little business. I worked under his supervision and followed out his instructions while I was there.

Q. You knew he was manager during all the periods from, say, 1940, until he was discharged in, say, November, 1944?

A. That's right.

Q. You were in and out of the office of the Abbot Kinney Company practically every day for—well, say, from 1942, the middle of 1942, on until—

A. I was only in the Abbot Kinney Company office at the time I was employed there. I automatically took and made collections. And they were made in triplicate; and when I turned them into the office, I was given receipts for the money that had been turned over to them.

(Testimony of Charles J. Brown)

Q. After you were discharged as an employee, you obtained certain leases from the Abbot Kinney Company, did you not?

A. That's right. I found an opportunity to engage in business. Naturally being around and associated with that thing where there is possibilities—and I paid 30 per cent [47] of my gross receipts.

Q. From that time on you were in and out of the Abbot Kinney Company office practically every day, were you not?

A. I was—I didn't go into the Abbot Kinney Company so very much, only as the occasion called for it. I wasn't running in and out of the office.

Q. As a matter of fact, you were in and out of the office almost every day or four or five times a week with Mr. Harrah and Mr. Gerety, too, were you not?

A. I think you are mistaken. I don't believe I was ever in the office or went into the office with Mr. Harrah. The only business I transacted with Mr. Gerety pertained to the business I had with the Abbot Kinney Company.

Q. With whom did you negotiate for the lease on the Robbins Building?

A. Well, the Robbins Building was—I negotiated the lease. First I talked to Mr. Gerety, and I got a sanction that it would be all right. But first I had to take and come to some understanding with Harry Robbins. So Harry Robbins said—well, I promised him a part of the profits; and he said, "Well, all right," he said, "then you pay me the rent."

I said, "Harry, it don't make a bit of difference to me. I will pay you the rent."

He said, "Then I will pay the Kinney Company."

(Testimony of Charles J. Brown)

So that continued for some time until I was raised the rent to \$500 a month. Then I paid to the Kinney Company. [48]

Q. With whom did you negotiate that lease with the Kinney Company?

A. I first talked to Mr. Gerety.

Q. Then who did you talk to?

A. Then I took it up, I guess, with the Executive Committee.

Q. Did you ever discuss it with John Harrah?

A. Yes, I told him what I was trying to do.

Q. You told him that before you entered into the lease with Mr. Robbins?

A. No, first I talked to Harry Robbins about that, because there was a lot of uncertainty about it and we had just started something new there. And I figured that in the venture there we had better see how it would work out. So I negotiated with Harry Robbins; and that was the understanding we came to, that I was to pay him the rent and then afterwards he wasn't satisfied with the arrangements having been made, and I agreed to pay him so much rent per week for the use of the fixtures.

The Referee: Q. Let me ask you this question: Which is the Robbins Building, Mr. Brown?

A. That is the one I occupy now; it is the triangular one that sets right alongside of the High Ride.

Q. And where is the Plaza Building?

A. The old Plaza Building was directly across the street, around the corner. It was a store-room over there, about maybe 75 or 80 feet off of Windward Avenue, the entrance of [49] the pier.

The Referee: Go ahead.

(Testimony of Charles J. Brown)

Mr. Davis: Q. You said that there was something new being started there?

A. I didn't say anything.

Q. Well, I understand you to say that you were planning on starting "something new" in the Robbins Building and you went to Mr. Robbins to talk about it, to talk about the lease. What did you mean by that statement that "something new" was being started?

A. I didn't say something new had been—

The Referee: I think you did use that expression, that you started "something new."

The Witness: Oh, we were about to make an application for a permit to the Police Commission.

Mr. Davis: Q. You were starting a new game; was that it?

A. It was a little differently described in the permit, when I applied for the permit.

The Referee: Q. What was it?

A. A Bridgo game.

The Referee: Go ahead.

Mr. Davis: Q. And were you a party to an action to determine the validity of that?

A. I was. In fact I fought it all the way through.

Q. You paid the cost of prosecuting that action?

Mr. Cobb: We object to that on the ground that it is [50] immaterial. What bearing has that upon the issues of this case?

The Referee: Sustained. Proceed.

Mr. Davis: I think it will be shown, your Honor, that the fee was paid by John Harrah, as I understand it. At least that is the admission made around in Venice, that

(Testimony of Charles J. Brown)

he paid for prosecuting that action. And why would he pay for it unless he was interested in—

Mr. Cobb: That is a false statement. I am tired of his making false statements like that.

Mr. Davis: I am trying to get it out. That is the information I have, Mr. Cobb. I am merely trying to find it out. I don't know.

The Referee: I will vacate the ruling and overrule the objection.

Answer the question: who paid the expenses of the litigation you have just mentioned?

The Witness: Well, to the very best of my knowledge the litigation was conducted and paid jointly by several of us that were operating that game.

Mr. Davis: Q. You say to the best of your recollection. What information do you have on that, Mr. Brown?

A. I contributed financially toward the payment of the suit.

Q. And who else contributed?

A. Robbins and the other operators. [51]

Q. Were there other operators there at Venice at that time?

A. Venice runs all the way to Ocean Park; and the—that was the way it was handled.

Q. And to your knowledge did William Harrah or John Harrah contribute anything to that?

A. Not to my knowledge. Mr. Harrah is the best advised on the technical operation of the game, and the operators always sought advice from him on how to conduct it. And that was his business.

(Testimony of Charles J. Brown)

Q. So you took it to Mr. Harrah, talked to him about how to conduct your business, did you?

A. Yes, sir, I have always sought his advice in that business, because I thought he was the most competent and capable. In fact, I had paid him certain fees for just such a purpose as that.

Q. With whom did you negotiate for the Bamboo Slide, the lease on the Bamboo Slide?

A. Well, I think I first talked to Mr. Gerety. They had had some trouble with Bullock—Hargraves and Bullock. And I said, "Eddie, I would like to get that place if you are going to make some changes out there."

"Well," he said, "I don't see why you can't." He said, "What will you pay?"

I said, "I will pay 30 per cent rent"—they were only paying 25. [52]

So he said, "I will see about it."

So I talked it over, and ultimately I got the lease on the Bamboo Slide.

Q. Did you ever talk to Mr. John Harrah about it?

A. I don't know. I might have discussed it. I do know I talked to Mr. Gerety.

Q. Has Mr. John Harrah ever received any of the moneys which you made out of the Bamboo Slide?

A. He has not.

Q. Has Mr. William Harrah ever received any of the moneys which you made out of the Bamboo Slide?

A. No.

Q. Has Mr. William Harrah ever received any money that you have obtained out of the operation of the Robbins Building lease?

A. Not a cent.

(Testimony of Charles J. Brown)

Q. Has William Harrah ever received any of it?

A. Not a cent.

Q. With whom did you negotiate the Merchants Building Parking Lot?

A. With Mr. Gerety.

Q. None of these discussions was had with John Harrah in the first instance?

A. The Merchants Building Parking Lot? Why, it isn't anything to get excited about. It parks 66 cars. There is very little business over there in the daytime. There is a [53] little over the week-end. There is \$150 a month rent, a woman at \$40 a week for working over there daytimes; and I pay a night man—

Q. Would you answer my question: I just want to know with whom you negotiated?

A. Well, after having the game over there, it was advantageous to have a place to—I talked to Mr. Gerety.

Q. Did you talk to Mr. John Harrah about it?

A. I may have discussed about the possibilities and the advantage of conducting a game and that I might want a lease on it. I don't believe any one wanted to outbid the lease on the parking lot.

Q. So whenever you wanted anything from the Abbot Kinney Company or any information regarding the Abbot Kinney Company you always went to Ed. Gerety; is that correct?

A. He was the manager.

Q. And so far as you knew, he was in full charge of the activities of the Abbot Kinney Company?

A. That's right.

Q. And he was so held out by the Abbot Kinney Company, wasn't he, as the one with whom to deal?

(Testimony of Charles J. Brown)

Mr. Kitzmiller: Just a moment. Before you answer that, I object to that on the ground that it calls for the conclusion of the witness.

The Referee: Sustained.

The Witness: Why— [54]

The Referee: You do not need to answer that. Go ahead.

Mr. Davis: Q. When did you first learn about the Cruickshank Company sprinkling system contract?

A. Well, after I was discharged, there was a terrible lot of turmoil. They were going to cancel all the leases. Everybody that had any leases on the pier was very much upset. So I had heard about the Cruickshank contract, and I talked it over with—Eddie Gerety called it to my attention.

He says, "By God, it looks as though we are going to be thrown out of here. There seems to be quite some trouble."

And quite some time before that there was a rumor Mr. Williams wanted to get the job I had. That was all right with me. So I thought the best thing to do was to protect ourselves as far as possible—myself.

Eddie says, "I will make a date over there and see what we can do."

So we went down to Mr. Darling's office and talked it over.

Q. That was the first time you had known of the existence of the Cruickshank Company contract, was when it was called to your attention by Eddie Gerety?

A. I knew that the contract had been operative or heard it discussed down there for a long time. While

(Testimony of Charles J. Brown)

it was not a daily discussion, it had been discussed at various times and brought up.

Q. And the first time it was called to your attention as to the possibility of purchase was when Mr. Gerety had this [56] conversation with you that you just gave?

A. No, I had heard about you and Mr. Newton anticipating purchasing it and neglecting to acquire it.

Q. When did you first hear that either Mr. Newton or I had an opportunity to purchase that contract?

A. I really just couldn't state the exact time.

Q. Would you say that was—

A. We worked from one day to the next day, and I can hardly separate months or—

Q. Was that a year or more before you purchased it?

A. I just exactly can't say.

Q. Or was it just a few days before you purchased it?

A. I should say several months. It was evidently dead and buried at the time it was resurrected, at the time it was brought up by Mr. Gerety.

Q. Do you recall the purchase price that I was to pay to purchase that contract?

A. No, that wasn't discussed so much.

Q. You did not hear that figure mentioned?

A. I heard something about \$10,000 at one time—yes, I did, come to think about it. When I was in Mr. Darling's office, he said they had given you an option at one time and that the time had elapsed and there was some discussion at that time so that you were totally washed out of the picture as to any right, title, or interest, in being able to acquire the contract. [56]

(Testimony of Charles J. Brown)

Q. At that time Mr. Darling did not mention to you the fact that I had the right to purchase it for \$10,000, did he? A. He did not say anything like that.

Q. Where did you get that \$10,000 figure?

A. Hearsay.

Q. And from information you had before you went in to see Mr. Darling?

A. No, it was pretty nearly all a closed situation. It was discussed there—one way or another, I can't tell you how, when, or where; but it was a dead issue at the time I started negotiating the deal with Mr. Darling.

Q. You say it was dead. Mr. Gerety told you it was a live issue, did he not?

A. I mean at the time I went in with Mr. Darling, he led me to believe that there was no connection with the deal that had been in the past.

Q. In other words, Mr. Darling just told you that the Davis interests had no further right to purchase that contract so far as Cruickshank and Company were concerned?

A. No, he referred—I don't know whether he referred to Davis or you or Mr. Newton. I believe he did refer to Mr. Newton.

Q. Mr. Brown, where was that conference between you and Mr. Gerety when Mr. Gerety first mentioned it to you? A. I don't know. We might have—

Q. Was that at the office of the Abbot Kinney Company? [57]

A. I think when he first brought it to my attention, talking about that, we were either out on the pier—I believe we had had a slight fire or something, where some of those sprinklers had performed very well. I think

(Testimony of Charles J. Brown)

there had been a fire out on the end of the pier in one of those buildings, or something. And he said, "Well, the old sprinkling system still saved our lives" or something like that. He said, "By God, it might be a good idea to get hold of that as long as they are going to throw us out of here. It might be a way to protect ourselves."

Q. Did Mr. Gerety point out to you that the contract had been in default since 1932 approximately and that there was \$137,000 due on it and nothing had been paid during all that time?

A. He might have called my attention to that. When I become interested in that, I discussed it with Mr. Pool.

Q. Who is Mr. Pool?

A. He is my attorney and had been.

Q. What did you do with Mr. Pool? Did you take the contract to him for an opinion?

A. No, I explained the situation about the contract and about the purchase—

Q. What did you say to Mr. Pool about the terms of the contract?

A. Now up to that time, when Mr. Gerety had called my attention to it, I had no idea about the figure that could be [58] arrived at; and I talked to my lawyer, Mr. Pool, over there (indicating).

I says, "What do you know about this contract? Mr. Gerety has called it to my attention."

He says, "I think it is a good contract."

Q. Then he knew all about the terms of the contract, did he, at the time he talked to you about it?

A. I think he was conversant with the contract.

(Testimony of Charles J. Brown)

Q. As a matter of fact, he—

A. But I hadn't discussed the price of the purchase with Mr. Pool.

Q. But he did know about the contract and seemed very familiar with it and— A. Yes.

The Referee: Please fix the time of this conversation.

Mr. Davis: Q. When did that conversation take place?

A. Shortly before that I purchased the contract.

Q. You purchased the contract at what time?

A. I forget the exact date.

Q. Some time in June of 1944?

A. Have you got—

The Referee: What is the date, gentlemen? Is there any question about it?

Mr. Davis: There isn't any question. I have never heard the exact date. I have tried to get it myself, your Honor. If there is an assignment there, I would like to see it. [59]

Mr. Kitzmiller: The 13th day of June.

The Referee: 1944?

Mr. Kitzmiller: 1944.

The Referee: If the contract was purchased June 13th, 1944, what was the first time approximately that Mr. Gerety talked to the witness?

The Witness: I think it was the latter part of May or about the first of June, along about that time.

The Referee: Q. In other words, you would say not to exceed 30 days elapsed between the date of the first conversation?

A. Before I become interested in purchasing it?

(Testimony of Charles J. Brown)

Q. That is what I mean. A. Yes, sir.

Mr. Davis: Q. What did Mr. Gerety say to you about the validity of that contract?

A. Well, I didn't get any opinion. My opinion was based upon Mr. Pool's deductions from the contract and what I had heard and the effort that you had put forth, that you were willing to purchase it but were unable to raise the money.

Q. You heard that, did you, that I had been unable to raise the money and that I was interested in it, and that was the thing that interested you in it?

A. That is what made me believe the contract was good.

Q. Did you have any conversation with me about the contract? [60] A. No, I didn't.

Q. And you did not know whether I actually had that, did you?

A. Mr. Newton was very active in it, and I considered your legal opinion as being worthy of some consideration.

Q. Did you have my legal opinion on it?

A. No, just from the effort you had put forth on it over there I considered it worth something.

Q. Did you know of any effort I had put forth?

A. I heard that you had anticipated at one time purchasing it, and I didn't think you would purchase bad merchandise.

Q. Whom did you hear that from?

The Referee: Let us not go into these minor matters.

Mr. Davis: Q. Did you hear that I had offered that to the Abbot Kinney Company for the price of \$10,000?

A. I might have heard that. I don't know.

(Testimony of Charles J. Brown)

Q. Did you hear that I had approached the members of the Board of Directors of the Abbot Kinney Company and urged them to purchase that contract at the price I could get it for, at \$10,000?

A. The only rumor I heard, Mr. Davis, was that 24 hours before your option had expired you and Mr. Newton had made an effort to have the Kinney Company buy it.

Q. At \$10,000?

A. The option you had had for some time. [61]

Mr. Kitzmiller: May we have that time fixed as to when that so-called option period was and as to the 24-hour—

The Referee: Yes. Mr. Reporter, please read that answer.

(The reporter read the following answer: "The only rumor I heard, Mr. Davis, was that 24 hours before your option had expired you and Mr. Newton had made an effort to have the Kinney Company buy it.")

You spoke about a 24-hour period. When was that 24-hour period if you know?

A. I don't know when—how long ago that was—

Q. You don't know? All right, go ahead.

A. —because it was just hearsay.

Mr. Davis: Q. Did you discuss with Mr. Gerety the possibility of receiving payment on account of that contract if you did go ahead and purchase it?

A. Well, I figured, after talking it over with Mr. Pool, that it would be kind of a leverage; in case they would try to push us around, we could come to satisfactory arrangements; and that it would be a good thing to have.

(Testimony of Charles J. Brown)

Q. Well, did you discuss with Mr. Gerety the possibility of payment, getting your money out of the contract?

A. Mr. Gerety felt that the contract was good from his past experience—one way or another, his connections or one thing or another—he felt that the contract was good.

Q. What did he say to you in regard to that matter? [62]

A. We discussed it over there; and he said, "Let's buy the contract together." I said—he said, "You can put up the ten," he said, "or a portion of it," he says. "I will take all I can."

The final conclusion was that when the actual price was \$15,000 that I would put up ten and he would put up five.

Q. Did Mr. Gerety tell you at that time how much available cash the company had to pay a down installment on the contract if you purchased it?

A. No, he did not.

Q. Did he make any statement to you that there was money that could and would be made available for that purpose?

A. No, he did not. When I discussed it with Mr. Harrah, he advised me about not purchasing the contract?

Q. Mr. John Harrah you are talking about now?

A. Yes, sir.

Q. When did you first talk with Mr. John Harrah about it?

A. Some time during the process of acquiring the contract.

(Testimony of Charles J. Brown)

Q. What did Mr. John Harrah say to you?

A. He told me he didn't think it would be a very good thing to buy in view of the fact that if the bondholders foreclosed all I could hope to receive back would be that portion of uncollected rents or various things of that type—or moneys that may have accrued in the Kinney Company outside of the—

Q. Did you tell Mr. Harrah that you were going to go [63] ahead and buy it?

A. On the advice of Mr. Pool, yes, I acquired the contract.

Q. You told Mr. Harrah you were going to do so?

A. I did—after I had purchased it.

Q. You knew Mr. Pool was also Mr. Harrah's attorney, did you not?

A. I don't know. He practiced law. I don't know his clients.

Q. You knew, as a matter of fact, that Mr. Pool had represented Mr. Harrah in some matters, did you not?

The Referee: You had better distinguish, Mr. Davis, between the Harrahs here. Which Harrah are you talking about?

Mr. Davis: They are so closely interwoven I don't know what name to use.

Q. Let us take John Harrah first. You know that Mr. Pool represented John Harrah on occasions, did you not?

A. Yes, I believe maybe he did, because I have known Mr. Pool pretty nearly as long as I have known Mr. Harrah, since 1925, I guess, or 1924.

(Testimony of Charles J. Brown)

Q. And you also knew of your own knowledge that Mr. Pool had represented Mr. William Harrah on matters, did you not?

A. I believe he did, come to think about it; but I hadn't thought of it at that time.

Q. And you knew that Mr. Pool also represented the Abbot [64] Kinney Company on one or two matters, did you not? A. I believe he did.

Q. So that before you actually purchased the contract, you talked the whole matter over with Mr. John Harrah? A. I so stated a minute ago.

Q. Now did Mr. John Harrah tell you that he thought that was a good contract and that there was a good chance of having some money paid on account of it?

A. I just stated in my answer in regard to what Mr. Harrah told me.

Q. What did he say about receiving any payment on it?

A. He told me he didn't think the contract would be good in case the bondholders foreclosed, and that all I could hope to receive was the unpaid rentals or moneys of that type—there was a question of whether I would get my money back or not.

Q. Did Mr. Harrah tell you in his opinion the bonds were outlawed and that if you purchased it there might be a chance of getting the money that accrued from rents?

A. That was—it was stated all I would be able to get was the money accrued from rents.

Q. And that money was the money that would be available to you for the payment of that contract?

A. Only that I would receive a small proportion of that which I had outlayed if there was a foreclosure of

(Testimony of Charles J. Brown)

the bonds. But he had never stated to me that the bonds were worthless. [65]

Q. No, he stated to you that the bonds had been outlawed, did he not?

A. No, I don't believe he told me they had been outlawed. I have heard that discussed more since the trial has been in operation.

Q. And he stated that the money which you would get on that contract would be the money that was derived thereafter from—or any money that they had on hand?

A. I would have a lien on it.

Q. And that you would have a right to get that money? A. Yes.

Q. Did he tell you how much money the company had in its possession about the same time you purchased that contract?

A. Mr. Harrah never discussed any of the business of the Abbot Kinney Company with me.

Q. Did Mr. Gerety tell you about how much money the company had at that time? A. No, he didn't.

Q. Now after you had received your opinion from Mr. Pool and you had your discussion with Mr. John Harrah and you had taken the matter up with Eddie Gerety, you came to the conclusion, did you, that you would like to purchase that contract?

A. On the advice of counsel I figured the contract was good.

Q. So then what did you do? [66]

A. Mr. Gerety made an appointment with Mr. Darling, who represented the Cruickshank interests.

Q. That is Mr. Hugh Darling of the law firm of Guthrie and Darling? A. That's right.

(Testimony of Charles J. Brown)

Q. Now at the time you purchased the contract you knew that nothing had been paid on the contract from 1932 up to the date that you were considering purchasing it; is that so?

A. There had been a new, supplemented agreement—that was the last one—that bound the present Kinney Company toward the payment of the contract.

Q. In other words, they had renewed the contract?

A. That's right.

Q. But they had never made any payments on account?

A. Yes.

Q. So that the statute of limitations had not run on it but no money had been paid on it?

A. The fact that they had authorized the renewal of it made it seem to be a good contract. At least that is what Mr. Pool led me to believe.

Q. But you did know that no cash had been paid—

A. That's right.

Q. —on the contract since 1932?

A. That's right.

Q. And you knew that it had gone into default in about 1933, did you not? [67]

A. I knew that the new supplemented—where they had bound themselves and validated the contract—that evidently it must have been good. If it hadn't been, it must be good now because they acknowledged it.

Q. So then Mr. Gerety, you say, made an appointment with Mr. Darling? A. Yes, sir.

Q. And did you keep that appointment?

A. I went down and met Mr. Darling in his office.

Q. Approximately what date was that?

A. I can't just fix the date.

(Testimony of Charles J. Brown)

Q. We have set here the date of the purchase as the 13th of June, 1944.

A. Well, it was some time prior to that.

Q. Was that two or three days before you actually purchased it?

A. If I purchased it on the 13th, prior to that time I negotiated the purchase, because at the time I purchased it I came in with cashier's checks to purchase the contract.

Q. At the time you first went to see him?

A. No, I did not. I said if I purchased the contract on the 13th, I came there at that time to consummate the sale—the purchase, rather.

Q. What did you say then to Mr. Darling, and what did Mr. Darling say to you? What was said generally in the first conversation you had with Mr. Darling? [68]

A. Well, let's see: In the first conference he said—I think he said he would see what he could do. I think he had to take it up with Cruickshank.

Q. How long was that conference?

A. I think I spent most of the time waiting in his outer office until he dispatched some other business there before I got in to see him.

The Referee: Q. Was Gerety with you?

A. Yes.

Q. Anybody else? A. No.

Mr. Davis: Q. Mr. Gerety made the appointment?

A. Yes.

Q. Who did most of the talking while you were there, Mr. Gerety or yourself?

A. Well, I was very much interested, and I discussed it. Both of us discussed it with Mr. Darling. And I

(Testimony of Charles J. Brown)

guess we were there quite some time about the purchase, negotiating the purchase.

Q. And what price was suggested as the purchase price?

A. I think the first—I think the first time there we—I think he had to consult Cruickshank to determine what was going to be asked, I think. I am not sure about that, but I think he had to consult Cruickshank.

Q. Did he tell you to come back at a later date?

A. Yes, we came back. [69]

Q. Did he telephone you and tell you to come back, or did you make a date at that time to discuss it?

A. He had spent considerable time in Washington, and he was anxious to get things cleared up as soon as possible. And I think he made an appointment with us at a prescribed time, if I am not mistaken.

Q. And that was on the 13th day of June?

A. That was when the deal was consummated.

Q. And you then went back to his office with Mr. Gerety?

A. We were both there.

Q. In the meantime had you talked to any one about the purchase of the contract?

A. I had previously talked to Mr. Pool.

Q. Between the time you first saw Mr. Darling and the 13th day of June did you have a further conference with Mr. Pool?

A. Well, I might have. I am pretty sure I did—or talked to him. I can't just exactly remember all those things. I mean he—I am sure I talked it over with Mr. Pool, and I can't say after the first meeting—I think after the first meeting I did talk it over with Mr. Pool.

(Testimony of Charles J. Brown)

Q. Did you tell him the result of your conference with Mr. Darling? A. Yes, sir.

Q. And then you decided to go back and meet with Mr. Darling on the 13th? [70]

A. If that was the date, yes.

Q. Did you have any discussion with Mr. John Harrah between the time you saw Mr. Darling and the time you purchased the contract?

A. I stated Mr. Harrah's position and his attitude.

Q. I just wanted to know if you talked to him again and if you told him that you were actually negotiating?

A. I can't say that I did or didn't. I don't remember.

Q. It is possible that you did, though?

A. Possibly I didn't.

Q. Then you went down on the 13th and consummated the transaction? A. That's right.

Q. How did you pay for the contract?

A. Cashier's checks.

The Referee: Just a moment.

Q. Now, Mr. Brown, how many conferences in all did you have with Mr. Darling?

A. I think we had two.

Q. Just two?

A. Two. The first one I talked to him; and I think then he had to determine the price and we came back and settled its figure.

Q. Now if he did not tell you the price at the first conference, how did you know how much money to

(Testimony of Charles J. Brown)

take to the second meeting at which you say you consummated the [71] transaction?

A. I think that Mr. Gerety informed me what Darling would take for the contract. Mr. Gerety was the man who had known Hugh Darling for a long time.

Q. Otherwise your testimony now is that after the first conversation with Mr. Darling you learned from Mr. Gerety first that the Cruickshank Company would sell and secondly what they would sell for; is that right?

A. That's right. I would like to set this point straight: Mr. Darling represents some air line. He flies back and forth and here and there. And that was the reason, I think, that he got in touch with Mr. Gerety and set the price so that we could come and—

Q. And that price was?

A. I may have been in the office a third time, but I can't just state.

Q. It may be important. Now think back and see whether or not you got the price direct from Mr. Darling, and if so when and how, or whether you got the price through Mr. Gerety.

A. I think I got the price through Mr. Gerety, if I am not mistaken, because he got in touch with him.

Q. You say "he" and "with him." Whom do you mean?

A. I mean Mr. Gerety got in touch with Mr. Darling.

(Testimony of Charles J. Brown)

Q. After your first meeting with Darling?

A. Yes.

The Referee: Go ahead, please. [72]

Mr. Davis: Q. You arrived, then, with cashier's checks? What were those cashier's checks in the amount of?

A. My own was in the amount of \$5,000, and I think Mr. Gerety's was in the amount of \$2500.

Q. In other words, you had two \$5,000 ones and he had two \$2500 ones?

A. That's right. My own was \$5,000, and I think Mr. Gerety had two \$2500—they were all stipulated in the purchase.

Mr. Davis: (Addressing counsel) This is an exact copy, is it?

Mr. Kitzmiller: So far as I know, it is exact.

Mr. Davis: Q. I call your attention to a purported copy of the assignment and ask you to look that over, Mr. Brown, and let us know if that is an exact copy, so far as you can ascertain, of the assignment given to you on the 13th day of June, 1944?

A. I haven't my glasses with me, and I can't read this.

Q. Well, that is a bad fix.

The Referee: Well, your attorney is here. Perhaps he can advise you as to whether or not in his opinion it is a correct copy.

(Testimony of Charles J. Brown)

Mr. Kitzmiller: I—

The Referee: We can receive it on the same terms. If there is any necessity for correction, we can correct it.

The document will be marked Banrupt's Exhibit No. 2.
[73]

I think we will take an adjournment at this time. Now, gentlemen, in order to obviate any technical objections here, could it not be stipulated that the rulings of Referee Dickson may be regarded as having been made in this one hearing over which I am presiding? In other words, it is a continuation of Mr. Dickson's proceeding up to a certain point and my taking over. Mr. Cobb expressed some anxiety as to whether he might have to review Mr. Dickson's rulings.

Mr. Cobb: I would like to have the matter go over and have it all be embodied in one order.

The Referee: Let us say, then, that it shall all be regarded as one proceeding?

Mr. Davis: That is satisfactory to us.

The Referee: Is there any objection to that?

(No answer.)

Everything will be incorporated into the one proceeding, and only one review will be necessary.

I now instruct all witnesses in the court room please to return to the court room at 2 o'clock without further notice. [74]

2:00 o'clock, P. M. session.

The Referee: All right, you may proceed, gentlemen.

CHARLES J. BROWN,

recalled for further

Direct Examination.

By Mr. Davis:

Q. When the contract was assigned to you, as I read that, the assignment was taken in your name alone; is that correct? A. Yes.

Q. And did Mr. Gerety at that time consent to having it taken in your name?

A. Well, I believe that there was some discussion at that particular time in Darling's office; and it was agreed upon between him and me that I should take it in my name and transfer him one-third interest.

Q. Was there any discussion why it should be taken in your name alone?

A. I can't remember a discussion. It was only coming to a conclusion. We talked it over there. Darling was there; and, as I remember, why, Eddie said, "Take it in your name and we can settle that out and straighten it out and you can transfer me one-third interest in it."

Q. Was there any other discussion of why it should be [75] put in your name alone and not also in Mr. Gerety's?

A. No, I can't remember that there was any discussion on that, only that was the conclusion that we come to after—I believe Mr. Gerety said it didn't make any difference, or something to that effect.

Q. So you just went ahead and had it put in your name? A. That's right.

(Testimony of Charles J. Brown)

Q. What did you do after you got that contract so far as the Abbot Kinney Company was concerned?

A. Why, after we got the contract, made the demand upon the Kinney Company for a payment.

Q. Was that demand in writing, or was that an oral demand at that time?

A. I just don't remember whether it was put in writing or whether it was oral.

Q. That was the time, was it not, that you appeared before the Executive Committee and made a request—

A. That's right, that's right, that's right.

Q. Now, as a matter of fact, you appeared before the Executive Committee on the 20th of June, did you not, which was one week after—

A. Yes, after I acquired it.

Q. After acquiring the—

A. And I think Darling said, "Well, now you have got it. Why don't you take some action" or something to that effect.

Q. Mr. Darling is an attorney at law? [76]

A. Yes, I guess he is.

Q. And he had, so far as you knew, represented the Cruickshank Company? A. Yes, sir.

Q. And he told you now that you had the contract to go ahead and make the demand?

A. No, he said, "You have got the contract. What are you going to do about it?" So I think there was some discussion about—they had made a previous demand or something.

(Testimony of Charles J. Brown)

Q. Who is "they"?

A. He, Cruickshank, or somebody had made a demand on the Kinney Company. I believe they had threatened to turn the water off or something.

Q. They had made that many times, had they not?

A. I don't know about the past, but at that particular time I think he said he had made a demand.

Q. But they had not taken any step to turn off the water?

A. I don't know whether the lapse of time under their demand had elapsed or not.

Q. Then you went in and demanded of the Abbot Kinney Company payment on account of the contract?

A. That's right.

Q. That was on the 20th of June, 1944?

A. That's right.

Q. One week after you got the contract? [77]

A. Yes.

Q. What happened? A. Well, I was paid \$7500.

Q. You were paid \$7500? A. That's right.

Q. What was said at that time?

A. Well, I said that the demand had been made under this contract and as long as we were the owners of the contract, why, I felt that we should be compensated and paid on the contract.

Q. And whom did you make that statement to?

A. To the Committee.

Q. And the Committee present at that time was John Harrah and Carleton Kinney; is that correct?

A. I think it was.

(Testimony of Charles J. Brown)

Q. Newton was absent?

A. I wouldn't say whether he was or he wasn't. I am not so sure whether Mr. Newton was there or not at that time.

Q. If the minutes of the Executive Committee meeting as of that time show that John Harrah and Carleton Kinney were present and Mr. Al. Newton was absent—

A. I will accept that.

Q. —would that refresh your recollection?

A. I would accept that.

Q. What did Mr. John Harrah say to you when you said you wanted some money on account? [78]

A. I don't know just exactly the words that were spoken at that particular time. I don't know whether they said they would take it under advisement—something evidently: I was paid some days later.

Q. Did Mr. John Harrah say that he didn't think that contract was worth anything and that he wasn't going to pay anything on account?

A. No, he didn't say anything like that. The fact is I got the \$7500. That is evidence in itself—

Q. Well, what did he say to you about it, about the payments?

A. I forget the conversation that took place.

Q. Did Mr. Carleton Kinney say anything at that time?

A. I think he entered into the discussion, certainly.

Q. What did he say?

A. I can't remember just word for word just what transpired there.

(Testimony of Charles J. Brown)

Q. I realize that, Mr. Brown. Just tell us as closely as you can.

A. To the best of my knowledge I got assurance I would get \$7500.

Q. How did you arrive at that figure of \$7500?

A. Well, the \$7500 was supposed to be one-fourth of the \$30,000 that was supposed to be paid at certain intervals.

Q. \$7500 was one-fourth of the \$30,000 yearly installment; is that right? [79]

A. That's right.

Q. And you received—

A. One-fourth of \$30,000.

Q. One-fourth of that. Did they tell you that was about all they had in the treasury of the company at that time?

A. No, before I had made this demand, I had talked it over with Mr. Gerety. He was interested in it. I never acted of my own volition without consulting the man that was interested in the contract with me.

Q. And Mr. Gerety advised you as to the amount that the company had in its coffers at that time?

A. No, I did not discuss that at all. The only thing I discussed about—about determining the amount.

Q. Now what did he say about determining the amount?

A. Well, he thought we ought to ask for \$7500 anyway.

Q. Did he give you any reason for asking for that amount?

A. I can't remember whether he did or not. That's the amount we arrived at to ask for.

(Testimony of Charles J. Brown)

Q. In other words, you just walked in and you said, "Gentlemen, we want \$7500 on account of our contract"; and they said, "All right, you can have it"?

A. No, they discussed it.

Q. What did they say?

A. They discussed it pro and con. I don't know whether I left there and came back a little later or not. But they discussed it between themselves. [80]

Q. Mr. Gerety was not present at that Executive Committee meeting?

A. No, he wasn't.

Q. Is that your testimony, that he was not present at that time?

A. No, I am sure Mr. Gerety wasn't in there at the time I made the demand.

Q. Well, every other time you had ever appeared before the Executive Committee Mr. Gerety was always there, was he not?

A. No, he wasn't.

Q. All right, go ahead and just tell us what was said.

A. Well, I think I went over that. They discussed it between themselves.

Q. Did Mr. Gerety appear with you and make the demand, or did you appear alone?

A. I appeared alone.

Q. You appeared alone?

A. Yes.

Q. You are sure that Mr. Gerety was not there and made the demand with you?

A. I am positive of that.

Q. So what did Mr. Carleton Kinney say, if anything, about the contract?

A. Well, as long as there had been a demand and threatened to turn the water off, why, they concluded it [81]would be a good idea to pay the \$7500 for the

(Testimony of Charles J. Brown)

services that had been rendered by—under the contract—in view of the fact that we had little minor fires now and then. So evidently rather than have the water shut off, they concluded that it might be good business to pay the \$7500.

Q. Did they ask you how much you had paid for the contract at that time?

A. I don't know whether that was discussed or not. I don't think so.

Q. Did you tell them what you had paid for the contract?

A. I don't believe that entered into the discussion at all.

Q. Did you serve a written notice upon the company that you had purchased the contract?

A. I don't know whether I notified them or not.

Q. Did you tell them at that time that Eddie Gerety had an interest in the contract?

A. I did. From the very inception I never practiced anything—from the time we purchased the contract, there was nothing hidden or anything else. It was known that we purchased the contract.

Q. And you told Carleton Kinney before you received the \$7500 that Eddie Gerety had an interest in the contract?

A. Yes, I did.

Mr. Davis: Have you gentlemen seen this check (handing a paper to counsel)? [82]

Q. I call your attention, Mr. Brown, to a check numbered 558, dated June 23, 1944, in the sum of \$7500, "Pay to the order of Charles J. Brown, Abbot Kinney

(Testimony of Charles J. Brown)

Company, by John Harrah and Carleton Kinney," and ask you if you have seen that check before.

A. I endorsed it without a question of doubt.

Q. That is the check you received on the 23rd day of June, 1944? A. That is the truth.

Q. That is the \$7500 check you have been referring to? A. That's right.

Mr. Davis: I would like to introduce this, your Honor.

The Referee: All right, Bankrupt's Exhibit 3.

Mr. Davis: Q. Now, as I understand it, Mr. Brown, neither Mr. Harrah nor Mr. Kinney asked you what you paid for that contract at that time?

A. To the best of my knowledge they may not have asked me but I might have told them.

Q. Did they ask you what you would take to settle the contract in full for?

A. No, there was no discussion of that.

Q. They just were not interested?

A. They didn't discuss the repurchase of the contract.

Q. Now after you received the \$7500, what did you do with that money? A. I deposited it in the bank. [83]

Q. And which bank did you deposit that in?

A. The Security-First National.

Q. And then what did you do in regard to disbursing the money, if anything?

A. Why, I gave Mr. Gerety a check for \$2500.

Q. And what did you do with the balance of the money, if anything?

A. It automatically stayed in my account.

(Testimony of Charles J. Brown)

Q. Did you take any money out in cash and put in a safe deposit box?

A. No, I guess I had—I usually had a very substantial balance. I usually had a balance running anywhere from—oh, up to as high as ten or twelve thousand dollars.

Q. And did you put any of this money in this safe that you had access to of John Harrah's?

A. I never put any money in John Harrah's safe.

Q. What did you do, just take it out?

A. I never took any money out of John Harrah's safe.

Q. Whose safe was it you testified this morning you had access to?

A. I told you I was working for William Harrah in the liquor store and I took money out of William Harrah's safe in the conducting of his business and as I bought merchandise and stuff came in and I paid bills, if they delivered merchandise, and put the receipts in the safe; or I went to the safe and cashed checks and gave change to the business. [84]

Q. Well, that safe was in John Harrah's office, was it not?

A. It was in William Harrah's business.

Q. Where was that located? Didn't Mr. John Harrah use that portion of the building for his office, too?

A. There was a desk in there, and Mr. Harrah was in their conducting William Harrah's business. But it was a store-room, if the truth was really known, because we stored our beer in there and all material and one thing and another used in the conducting of the business.

Q. Did any of this \$5,000 that you retained—

A. Never went into that safe, no.

(Testimony of Charles J. Brown)

Q. It never got into that safe?

A. Not a penny, no.

Q. After that do you recall that a petition in bankruptcy was filed against the Abbot Kinney Company?

A. That's right.

Q. And that was filed on the 21st day, I believe, of October?

The Referee: That is right, October 21.

Mr. Davis: Q. Now you found out about the filing of that petition right after it was filed, did you not?

A. Yes. I think the office was immediately notified.

Q. Yes, within a few days after that?

A. That's right.

Q. Then you were also advised, were you not, that there [85] was a special meeting of the stockholders of the Abbot Kinney Company being called for the purpose of electing a new Board of Directors, and that the notice was for November 8, 1944?

A. Why, I believe there was quite a little turmoil. Yes, I will accept those dates that you say.

Q. And knowing that the petition in bankruptcy had been filed and that a special meeting of the stockholders for the purpose of possibly eliminating the old Board of Directors had been called, you then made another demand upon the then existing Executive Committee for some additional money on account, did you not?

A. I did, on the advice of my attorney, Mr. Pool.

Q. Mr. Pool was representing you, then, at that time also?

A. Yes, sir.

Q. And what did Mr. Pool advise you to do?

A. He told me the best thing to do was to make a demand on them for the agreed upon payment of \$30,000

(Testimony of Charles J. Brown)

which was to be paid for the coming year; and—and I followed his advice.

Q. So you followed his advice, and you prepared the written demand under date of November 6, 1944?

A. I did, in longhand.

Q. In longhand. Did you know at that time when you asked Mr. Pool as to what you should do that Mr. Pool was the attorney for Abbot Kinney Company?

A. No, I didn't know anything about that, because, he having been my attorney, I accepted his advice and I didn't [86] know anything about that.

Q. Did you know that he was actually representing the alleged bankrupt and had been so employed by the Abbot Kinney Company under date of October 24th?

A. No, I didn't know that. If I had possible known that and known that there was going to be complication, I would have been smart enough to have tried to hire another attorney or handle the matter in some other way so that I would save myself any complications.

Mr. Davis: Have you gentlemen seen this (handing a paper to counsel)?

Q. I call your attention, Mr. Brown, to a longhand memorandum on the letterhead of Abbot Kinney Company, dated November 6, 1944, directed to Abbot Kinney Company and purportedly signed by Charles Brown; I ask you if you have seen that document? A. I wrote it.

Q. That is in your handwriting?

A. My handwriting and I wrote it.

Q. You wrote this under the instructions of Mr. Pool, as I recall your testimony? A. I did.

(Testimony of Charles J. Brown)

Q. And this wording was Mr. Pool's wording, but you put it in your own handwriting?

A. That is what we wrote.

Mr. Davis: I would like to introduce this as— [87]

The Referee: All right, Bankrupt's Exhibit 4.

Mr. Davis: Q. Now when the written demand was made upon the Abbot Kinney Company, upon whom was that served? A. On the Executive Committee.

Q. And was that at a regular meeting of the Executive Committee, as you recall? A. I think it was.

Q. Who was present at that time?

A. Carleton Kinney and John Harrah. It was the regular meeting. I don't know whether Newton was there or not.

Q. Well, if I should say that the minutes of the regular meeting of the Executive Committee, dated November 7, 1944, at which this problem was discussed, show that only John Harrah and Carleton Kinney were present and that Al. Newton was absent, would you say that that was a fact? A. I would accept that.

Q. And you would say that was a fact? A. Yes.

Q. Was Mr. Eddie Gerety present at that meeting?

A. I don't think Eddie Gerety was ever in the Committee room when I was there.

Q. The Committee met in his office, did it not, in the Abbot Kinney Company?

A. Yes, but I don't believe he was in the office.

Q. What did you do when you went in and made the demand?

A. Well, I wrote it all out; and I guess they could read [88] English.

(Testimony of Charles J. Brown)

Q. Did Mr. Pool appear with you at that time?

A. No, he did not.

Q. Where was Mr. Pool when you wrote that letter, Bankrupt's Exhibit 4?

A. Let's see where I wrote that letter—

Q. As a matter of fact, you wrote that out at the Executive Committee just before you went in, and Mr. Pool was there; isn't that so?

A. No, I didn't. I think—I think I wrote that out in the old office of the Plaza Building that I had.

Q. And that was written out on the same morning that the Executive Committee meeting was held; isn't that so?

A. That night or afternoon, I forget which—or the night before.

Mr. Kitzmiller: It is dated the 6th.

The Witness: I think it was the night before—I wrote that out the night before.

Mr. Davis: Q. You wrote that out the night before?

A. Yes.

Q. Who was present at the time you wrote that out?

A. Pool and I.

The Referee: Q. I beg your pardon, I didn't hear you.

A. Mr. Pool and I.

Q. Where did you write it?

A. I had an office in the back of the old game in the [89] Plaza Building.

The Referee: All right.

Mr. Davis: Q. Was Mr. John Harrah present at that time?

A. No, he wasn't. There was just Mr. Pool and myself.

(Testimony of Charles J. Brown)

Q. Does Mr. John Harrah have access to that office of yours in back of the Plaza—

A. He didn't have at that time. That was the old Circle game that was torn out. I had a desk in there, and I used it—had an old safe and stuff.

Q. Did Mr. Pool tell you they were going to have a meeting of the Executive Committee the next day and for you to come in and make that demand?

A. Well, I guess he knew there was going to be a meeting the next day or we wouldn't have prepared to make the demand the following day.

Q. Did he get in touch with you and tell you you ought to make the demand?

A. Well, he advised me right along on the contract, because he was my attorney.

Q. Did he tell you that all of the money of the Abbot Kinney Company was then in custodia legis; that is, in charge of the Court, because the petition in bankruptcy had been filed?

A. No, he didn't so inform me about that.

Q. Did you ask him if that bankruptcy proceeding made any difference so far as the payment of the \$30,000 was [90] concerned?

A. I don't believe I did.

Q. You don't believe you did?

A. No.

Q. Now how did you arrive at the figure of \$30,000 that you were going to demand?

A. That was supposed to be the annual payment.

Q. But you had already received \$7500 on account that year?

A. But that was for a 90-day period.

(Testimony of Charles J. Brown)

Q. But you said you figured that on the basis of a quarter of the—how did you arrive at the figure of \$30,000?

A. That was what they agreed to pay every year.

Q. But that would mean they would pay \$37,500 in less than a year's time.

A. At the time I made the second demand, the \$7500 worth of service rendered had expired.

Q. You had been rendering a lot of service during that time, worth \$7500?

Mr. Kitzmiller: I object to that on the ground that it is argumentative and facetious.

Mr. Davis: Q. Had you been rendering some service?

A. The sprinkling system was put there in case of any fire.

Q. That is the same sprinkling system that had been there since 1931? [91]

A. And it put out many a fire.

Q. And it was the same that had been since 1931?

A. That's right.

Q. What did Mr. Harrah say when you went in and made the demand upon the Executive Committee for the \$30,000?

A. Well, I made certain inducements. I agreed to give them \$50,000 credit on their debt for a \$30,000 payment. They evidently conceded that it was good business.

Q. What did Mr. Harrah say?

A. They discussed that between themselves and come to the conclusion they would pay the money.

(Testimony of Charles J. Brown)

Q. Did they say anything in your presence that you heard?

A. They discussed it between them. I don't know as I paid a great deal of attention.

Q. Weren't you interested in what they were saying?

A. I was interested in it, but the most important thing was to come to some conclusion and if possible collect the \$30,000.

Q. Did they suggest that maybe you take a lesser amount than that?

A. Well, I set that figure; and I was rather positive about the figure.

Q. Did they just acquiesce and—

A. Said they would.

Q. —pay you the \$30,000? [92]

A. They agreed to pay the \$30,000 for a credit of \$50,000. They thought that was a Leap-year discount, I guess.

Q. How much, on your figures, did that then leave owing on the contract?

A. There was a balance of, I think, \$138,000.

Q. How much did it leave owing after you had given them all the credit you say you were going to give them?

A. I think \$138,000 is due on it yet.

Q. On it now? A. Yes.

Q. You would say the balance is \$138,000?

A. The balance is \$83,000.

Q. That is what you agreed would be the balance?

A. Yes.

(Testimony of Charles J. Brown)

Q. If they would pay you \$30,000 and agree to pay you the balance, the \$83,000, you would say that was in satisfaction of the contract?

A. When I made the demand and gave them credit for \$50,000 on the contract, there was no discussion as to what I would receive on the balance. That was a deal within itself and ended there.

Mr. Davis: Let me get that again, please, Mr. Reporter.

(The reporter read the answer.)

(Addressing counsel.) You gentlemen, I think, have seen this.

Q. Now, Mr. Brown, I call your attention to the letter [93] of November 6, Plaintiff's Exhibit 4, which specifically states, "You do by this acceptance acknowledge that the balance then remaining unpaid is approximately \$80,000"—

A. That's right.

Q. —"which is now due and which you promise to pay." That was part of the deal, was it not, Mr. Brown?

A. That's the truth.

Q. So that you did in fact have a definite understanding at that time as to the balance that was due and that they would agree to pay it?

A. That was \$83,000—and accumulated interest. The agreement there stands for itself for what it states.

Q. Now you also provided in here that this was only conditioned upon the present directors' staying in office and that there be no change in the Executive Committee; is that correct?

A. That's right, because I figured—I had bought this thing for the sole purpose of protecting myself on the leases and there was some discussion about canceling

(Testimony of Charles J. Brown)

everything and one thing and another. If those things hadn't arose, I question whether I would have ever bought the contracts.

Q. As a matter of fact, Mr. Brown, by this time you had already had all of your leases renewed, had you not?

A. Naturally I had come along over there and asked for an extension of time and renewal on my leases.

Q. And this Executive Committee had already given you— [94] A. That's right.

Q. —a renewal on each one of your leases as far as they could under the present existing lease with the City of Los Angeles; isn't that right? A. That's right.

Q. So you had absolutely nothing to gain from the standpoint of leases by continuing this Executive Committee in control?

A. I believe that you questioned those leases right off of the reel and questioned those leases and said they were no good. There was some discussion about their being no good.

Q. That was all after the old Board was ousted?

A. The general turmoil around there. Even prior to the time there was a whole lot of general discussion about this and that, and the thing was in very much of an upset condition.

Q. But you already had the leases, did you not?

A. I attempted to protect myself as far as possible.

Q. Now I call your attention to check No. 739, the Abbot Kinney Company, dated November 8, 1944, in the sum of \$30,000, made payable to the order of Charles Brown by Abbot Kinney Company, signed by Harrah and Carleton Kinney, and ask you if you have seen that check? A. Yes, sir, and there is my name on it.

(Testimony of Charles J. Brown)

Q. And you received the check and got payment of the \$30,000? [95] A. I did.

Q. Then you knew at the time you received the \$30,000 that a petition in bankruptcy was then pending, the bankruptcy of the Abbot Kinney Company?

A. I knew some legal action had been taken.

Q. And that a petition in bankruptcy had been filed?

A. I think it had or was contemplated anyway.

Q. Well you knew? A. Yes.

Q. Yes. And you knew also that the notice had been sent that on November 8 a meeting of the stockholders had been called for the purpose of electing a new Board of Directors?

A. Yes, I heard that they had some trouble and one thing and another, contemplated making a change or something.

Q. Who told you that a meeting of the stockholders had been called for November 8th?

A. I don't know how I found it out.

Q. Did John Harrah tell you?

A. No, I don't believe he told me. I don't remember how I found out. I can't remember.

Q. Did Eddie Gerety tell you?

A. I wouldn't say that Eddie Gerety told me either. I don't remember how I heard the news.

Q. Now when you arrived at this figure of \$30,000, did you know that that was about all the cash that the company had available? [96] A. No, I did not.

Q. You didn't know that was just about all the cash the company had available?

A. No, I have no knowledge of knowing that.

(Testimony of Charles J. Brown)

Q. You have been around the Abbot Kinney Company a long time and knew that \$30,000 in cash was almost an unheard of balance for the Abbot Kinney Company, didn't you?

Mr. Heap: I object to that as argumentative.

The Referee: Sustained. Proceed.

The Witness: I have no way of knowing what their balance—

The Referee: Never mind.

Mr. Davis: Q. After you received the \$30,000, Mr. Brown, what did you do with it?

A. I deposited it in the bank.

Q. Then what did you do with the money?

A. I gave \$10,000 to Eddie Gerety.

Q. You gave that to him by check? A. By check.

Q. What did you do with the balance?

A. I just left it in the bank.

Q. And how long did it remain in the bank?

A. It was never taken out of the bank until such time as I withdrew \$20,000 and put it up—

Q. That is when you deposited it with the Court?

A. That's right.

Q. Now who put up the \$10,000 that you used for the [97] purchase of the contract?

A. I put the money up myself.

Q. How much of that did John Harrah put up?

A. Not a cent.

Q. How much did William Harrah put up?

A. Not a cent.

Q. William Harrah acquired an interest in that contract, did he not? A. That's right.

(Testimony of Charles J. Brown)

Q. When did he acquire that interest

A. I sold him a half of my interest after I had received the \$30,000.

Q. And how did you come to sell William Harrah an interest in the contract?

A. Well, William Harrah—I believe that the new Board of Directors had made certain demands upon him or threatened him with lawsuits in regard to the old Plaza Building and he wanted something to kind of protect his interest in one thing and another. So he asked me about purchasing an interest in that balance of the contract, which he did; I sold him a half of my interest in it.

Q. A half of your interest. Now your interest—you had about two-thirds of eighty—

A. About fifty odd thousand.

Q. About fifty-two thousand, close to that figure?

A. Yes. [98]

Q. And half of that would amount to \$27,000?

A. That's right.

Q. So you sold a \$27,000 interest in a contract on which you had just received \$37,500 for how much?

A. \$3,000.

Q. You sold that for how much, \$3,000?

A. Yes.

Q. And you sold that because you wanted to help him out as against a possible lawsuit by Abbot Kinney Company?

A. Just a minute. I questioned whether I was going to be able to receive any more money on the balance of that contract. In view of the fact of the general condition

(Testimony of Charles J. Brown)

and all and on Mr. Williams' say-so—he said that he was going to spend the money as fast as possible on the pier so that there wouldn't be any money in the treasury.

Q. Now what did you say—

A. So if there wasn't any money to be had over there, I thought that would make a good deal.

Q. Why did Mr. Williams say that he was going to spend it on the pier? Was it because the pier needed it?

A. He said—about—I think the truth of it—what Mr. Williams told me was, he said that if he didn't spend it the Davis interests would take it all away anyway.

Q. As a matter of fact, you knew that Mr. Williams had gone in there and had ousted the Harrah interests, so to speak, because of actions taken by the Davis group, did you not? [99]

Mr. Kitzmiller: Now that is compound, unintelligible

The Referee: Sustained. Proceed.

Mr. Davis: Q. Did you know the condition of the pier? At the time you received this \$30,000 did you know the condition of the pier so far as repairs and the lack of repairs are concerned?

Mr. Cobb: We object on the ground that it is wholly immaterial. The conditions of the pier and the repairs have no bearing upon the issues in this case.

Mr. Davis: I think it goes to this, your Honor: that the pier was in desperate need of repair, had been for some time.

The Referee: How does that concern us, Mr. Davis?

Mr. Davis: And this money, if John Harrah and Carleton Kinney, who made up this Executive Committee,

(Testimony of Charles J. Brown)

were not interested in the contract, they would have spent in the repairs of the pier rather than throwing it away on a contract which had nothing paid on it since 1932. I believe it is material to show that.

The Referee: You can prove that by your own witness, not indirectly by this witness here.

Mr. Davis: This is not indirectly. This gentleman has been around the pier as much as anybody else.

The Referee: What does he know about the condition of the pier?

Mr. Davis: He knows as much as anybody.

The Referee: Sustained. Proceed. [100]

Mr. Davis: Q. Did William Harrah personally contact you about the purchase of an interest in the contract?

A. I believe his father had talked to me or said something to me—I had talked to him over the phone.

Q. You talked to William Harrah?

A. Yes, at Reno.

Q. He called you, did he?

A. I don't know whether he called me or I talked to him.

Q. But it was during one of those times you were doing some business with him, as I recall your testimony before?

A. I don't know about that. There was something come up anyway. So afterwards, why, I guess I talked it over with his father or his father previously talked to him about it.

Q. What did he say to you then?

A. The ultimate outcome was that they purchased it.

(Testimony of Charles J. Brown)

Q. What did Mr. William Harrah say to you about the possible purchase?

A. I forget just the telephone conversation.

Q. Well, approximately, as closely as you remember?

A. Well, he wanted to buy an interest in the contract in view of the fact of the action or something that had been brought against him; and I told him I was perfectly willing to sell him an interest in it; and ultimately he did settle it on the basis of \$3,000.

Q. Did you have a subsequent conversation over the telephone with him about it? [101]

A. No, his father settled it.

Q. I understand that—

A. His father settled the business.

Q. You had a conversation with his father, did you, about it?

A. I had a conversation with William Harrah.

Q. Then did you have any conversation with John Harrah about it?

A. After John Harrah had evidently discussed the thing with his son.

Q. And where did you meet John Harrah?

A. Oh, I possibly met him along the street any time there. You can't go very far without meeting anybody in Venice. The sphere of activity is very limited.

Q. Well now, is it not a fact, Mr. Brown, that you never discussed this with John Harrah at all but that you carried on the entire transaction with William Harrah over the telephone?

A. No. I settled it with John Harrah.

Q. You finally settled it with Mr. John Harrah?

A. Yes.

(Testimony of Charles J. Brown)

Q. And what did Mr. John Harrah say to you?

A. Well, he said—he just come to the conclusion that \$3,000 would be satisfactory.

Q. Would be satisfactory to him or to you?

A. He agreed on \$3,000. And it was satisfactory to me, [102] and that was the consummating of the deal.

Q. What did you say to Mr. John Harrah about the possible purchase of the contract by William Harrah?

A. You mean to purchase that portion?

Q. Yes, what did you say to him and what did he say to you?

A. Well, William Harrah—I discussed that over the telephone with him; and he said that he had, I guess, been served with some papers. Is that right?

Q. I don't think so.

A. Or threatened, anyway, in some shape, form, or manner in regard to the suit that was pending, and in regard to the rental on the old Plaza Building, as I understood it. So that he wanted to fortify himself and have something to straighten out any claim after it arose.

Q. So then you proceeded to tell him that you would sell a half interest?

A. A half of my interest.

Q. Of your interest for \$3,000?

A. That's what I did.

Q. And the assignment—

A. Which I considered good business.

Q. Did he prepare an assignment then to you; or did you prepare an assignment to him?

A. I did.

(Testimony of Charles J. Brown)

Q. By whom was that assignment prepared? [103]

A. I don't know whether—I don't know who prepared it. I think it might be Eddie LaCome or Mrs. LaCome.

Q. Do you recall, then, who prepared that assignment?

A. If I am not mistaken, I think Eddie LaCome typed it out over there in the office of the Bamboo Slide.

Q. Who dictated it, Mr. Pool?

A. I forget now.

Q. You don't recall?

A. I forget just exactly—I just forget exactly where it was done, whether—I don't know whether Pool was there—I think it was done in the office there of the Bamboo Slide.

Q. Did John Harrah prepare the assignment?

A. No.

Q. You are sure John Harrah did not prepare it?

A. I think I answered it. I forget now. There was a terrible lot of detail continually about these things.

Q. And then what did you do with that assignment after you had it prepared?

A. I delivered it to John Harrah.

Q. Did you receive a check for it?

A. I don't know whether I received a check from William Harrah or \$3,000 in cash. I forget which.

Q. Well, how did you receive it? Was it sent to you by mail, or how did you receive it?

A. I think I received cash from John Harrah.

Q. You received cash from John Harrah? [104]

A. On delivering of the assignment.

(Testimony of Charles J. Brown)

Q. Where did Mr. Harrah get that cash, out of the safe we have been referring to?

A. I don't know where he got the money.

Q. Where did you make the delivery of the assignment?

A. I really don't know. I am not trying to be evasive, but I can't remember a lot of little details like that. I don't remember exactly where it was that I delivered—

Mr. Cobb: I understand that there is a check in the court room. If it was handled by check, we will produce it.

Mr. Mapes: It was a check.

The Witness: That's right. It was a check.

The Referee: All right.

Mr. Davis: Q. Now at the time you discussed with Mr. Harrah the possibility of buying this contract, what did he say about its value?

A. Now what are you referring to now, the tail end of the—

Q. Yes, at the time you made this assignment to Mr. William Harrah and you were discussing with John Harrah the contract, what did he say as to its value?

Mr. Kitzmiller: If anything.

Mr. Davis: Q. If anything.

A. I had already concluded that I was not going to be able to receive any great amount of money on the balance of the contract in view of the fact of the actions that had been [105] taken, and that I was perfectly satisfied with what I received for it. And from the general consensus of opinion, like I had talked to Mr. Williams and he had revamped everything and said he wanted to

(Testimony of Charles J. Brown)

spend everything as fast as it came in so that there wouldn't be any money in the treasury—

Q. What did Mr. Harrah say about it?

A. Well, evidently he thought that he bought something; or he wouldn't have advised his son to give me a check for \$3,000.

Q. So you went ahead and consummated it?

A. That's right.

Q. Did you talk to Mr. Eddie Gerety about selling the interest to Mr. William Harah?

A. Eddie had no interest in my two-thirds.

Q. Your answer is you did not talk to Mr. Gerety about it?

A. I believe I told him about it; but I don't believe I discussed it with him, because it wasn't any of his business.

Q. Well, as I understand it, the reason you did not think the contract had much value to you was because there had been a change in the directors of the Abbot Kinney Company?

Mr. Kitzmiller: Just a moment. I object to that on the ground that it assumes facts not in evidence.

The Referee: Sustained. Proceed. Anyway that is argumentative. Proceed.

Mr. Davis: I think that is all, your Honor.

The Referee: Mr. Cobb, do you want to cross examine; or [106] do you want to call him as your own witness?

Mr. Cobb: We will call him as our own witness, your Honor, later.

The Referee: Q. Mr. Brown, I want to ask you a question.
A. Yes, sir.

(Testimony of Charles J. Brown)

Q. How did you know that there would be an Executive Committee meeting at the time when you appeared before the Executive Committee and asked for your \$30,000?

A. Well, prior to the time there was an Executive Committee they always sent out notices and it was always more or less discussed around the pier as a whole about when the meetings were going to take place, because at that particular time everything was really in such an upset condition amongst all the concessionaires. I think my gross business that year was about \$159,000, if I remember correctly. And naturally, why, through the graveyard and one thing and another the word circulates around about when the meeting is going to take place. And of course, when the new regime came in, most of the concessionaires were very upset about what somebody was going to do or what was going to take place.

Q. The Executive Committee consisted of three people, did it not, Mr. Brown?

A. At that particular time?

Q. Yes. A. Yes, I guess it did; that's right.

Q. Certainly if the Executive Committee was going to have [107] a meeting, they wouldn't send notices of the proposed meeting to anybody but the members of the Executive Committee, would they?

A. Evidently that leaked out, because somebody always said, "There's going to be an Executive Committee meeting." Or there was something like that. And there seemed to be no secret about these matters. They were held, I think, pretty regular.

(Testimony of Charles J. Brown)

Q. When you went down to Mr. Darling's office to consummate the assignment, how many checks did you take along?

A. I took two, and I think Mr. Gerety took two.

Q. Did you have Mr. Gerety's checks, or did he have some?

A. Mr. Gerety, if I remember, bought the last check over here at the Bank of Italy right over here (indicating) prior to our going up to Mr. Darling's.

Q. Now your two checks were for how much?

A. \$5,000 each.

Q. Why did you take two checks?

A. I drew \$5,000 out of my personal account, and I took \$5,000 out of my safe deposit box.

Q. You took \$5,000 out of your account in the Security—

A. First National Bank.

Q. The Security-First National Bank of Venice?

A. Yes, sir.

Q. And that was a checking account?

A. Yes, sir. [108]

Q. Did you buy a cashier's check with it right there at the bank?

A. Right there at that time.

Q. Made payable to yourself, was it, or to the Cruickshank Company?

A. I think it was made payable to myself; and I endorsed it, I believe, because in the receipt—

Q. Now your safe deposit box was in the same bank?

A. The same bank, yes, sir.

Q. And with respect to the time that you purchased the cashier's check with your withdrawal from your ac-

(Testimony of Charles J. Brown)

count for \$5,000, when did you buy the cashier's check with the \$5,000 you took out of your safe deposit box?

A. If I remember correctly, I think I bought them all at the same time.

Q. Yes. Well, what is your best recollection? Where are the safe deposit boxes in that bank? Are they on the same floor?

A. The same floor, back. It is the far north end of the bank.

Q. What did you do first, do you remember?

A. Well, now, that I just can't tell you which operation I done. But if I am not mistaken, I bought them both at the same time.

Q. No, that is not it, Mr. Brown. What did you do first? Did you complete the entire transaction on one visit to the bank? [109]

A. Well, now, I go to the bank two or three times a day—

Q. Yes.

A. —and I deposit in the bank. I deposit in the bank—I usually have a balance anywhere up to ten or twelve thousand dollars, thirteen thousand dollars, in the bank. I usually have cash on hand in my safe, oh, \$2500 or \$3,000, because I have to—I daily use about two thousand, over \$2,000 in cash.

Q. All right. Get back to the question. What is your recollection as to what you did that day?

A. Now I told you, Judge, to the very best and honest knowledge I can't tell you except that I know that I purchased two, because it wasn't anything extraordinary—there was no way for me to fix some particular situa-

(Testimony of Charles J. Brown)

tion on that particular day, because it's regular routine for me to go in and out of there all the time.

Q. But you don't buy cashier's check to the extent of \$10,000 very often? A. No, I don't.

Q. Well, frankly I would like to have you explain to me why you bought two cashier's checks.

A. Well, I think I bought—I think I bought—I bought—I bought—I drew a check for \$5,000, and I think I took the \$5,000 of the—or a portion of it anyway—out of my safe deposit box—with what I had taken out of the other safe of mine, which I had. [110]

Q. You have made the unqualified statement you took the \$5,000 out of your safe deposit box. Do you want to change that testimony?

A. Well, now, I don't want to change. I think to the very best of my knowledge I must have taken—whether I did or didn't, all I can tell you is that I bought two checks. And I drew one that I used in cash, and the other I drew out of my account. And by doing that it was all in the one operation.

Q. You say they sell cashier's checks at only one window?

A. No, they didn't. Down there they sell them at any window.

Q. Any window?

A. Yes, sir, any one of the windows from the Security-First National Bank at Venice.

(Testimony of Charles J. Brown)

Q. You can't buy cashier's checks at the safe deposit vault, can you, Mr. Brown? A. No.

Q. So the normal procedure would have been for you to take your cash to some window and make out a check for the balance of the money that you needed to draw from your account and buy a \$10,000 cashier's check. I want to know why you didn't do that?

A. Well, I can't give you a natural why one man walks on one side of the street and not on the other. I can't remember why I done that or why I bought them at the same [111] window.

The Referee: You may step down.

Mr. Davis: I think I can identify Mr. William Harrah's signature by this, your Honor.

Q. Mr. Brown, are you acquainted with Mr. William Harrah's signature? A. Yes.

Q. Is this his signature? A. Yes.

Mr. Davis: (Addressing counsel) Have you gentlemen seen this letter to the Abbot Kinney Company (showing a paper to counsel)?

I would like to introduce this as bankrupt's exhibit next in order, a letter date November 30th, Reno, Nevada, on the letterhead of which is "Reno Harrah's Bingo, the biggest little city in the world, Harrah's Bingo, 242 North Virginia." It is signed by William F. Harrah.

(Testimony of Charles J. Brown)

The Referee: It will be marked Bankrupt's Exhibit 6. One question, gentlemen: When was the money deposited in court? Does anybody know?

Mr. Davis: The exact date I don't, your Honor.

Mr. Pool: It was my check, your Honor. I will find out.

The Referee: Was it before or after November 30, 1944?

Mr. Pool: What was the date of our stipulation?

Mr. Davis: Yes, it was, because I think it was filed after I had left for Sacramento. [112]

Mr. Pool: It was after that stipulation was signed, just a few days. I want the date on that.

Mr. Heap: January 8th.

Mr. Pool: Then it was after January 8th. It was deposited pursuant to that stipulation.

The Referee: Is there anything else?

Mr. Davis: I think that is all.

Mr. Pool: Do you want the exact date, your Honor?

The Referee: No, I only wanted to know if it was before or after November 30, 1944. Very well. Go ahead, gentlemen.

Mr. Davis: I believe that is all.

The Referee: All right, step down, Mr. Brown.

(A short recess.)

Mr. Davis: Your Honor, I would like to recall Mr. Brown to the stand for a moment.

The Referee: All right.

CHARLES J. BROWN,

recalled for further

Direct Examination.

By Mr. Davis:

Q. Did you know Mr. John Harrah at the time the petition in bankruptcy was filed against him?

Mr. Cobb: To which we object on the ground that it is immaterial.

The Referee: Why don't you fix the time? [113]

Mr. Davis: I am—

The Referee: Overruled.

Mr. Cobb: It is a matter of public record.

The Referee: All right, do you know?

A. No, I don't.

Mr. Davis: Q. You knew that a petition in bankruptcy had been filed against Mr. John Harrah, did you not?

A. Yes, I knew that such a thing had; but I have no idea—I have no way of placing the time.

Q. You knew Mr. Harrah at the time that petition in bankruptcy was filed, did you not?

A. I have known Mr. Harrah 25 years.

(Testimony of Charles J. Brown)

Q. Now prior to the time that that petition in bankruptcy had been filed against Mr. John Harrah, had you ever worked for William Harrah? A. No.

Q. Your employment with William Harrah and your contact in a business way with John Harrah has all been since his petition in bankruptcy was filed?

Mr. Kitzmiller: Just a moment. I object to that. You have not set the date as to when this petition was filed.

The Referee: Overruled.

Answer the question.

The Witness: Well, I think William Harrah is about 34 years old, if I am not mistaken, or thereabouts. So if you take 25 from that, you can determine about his age, about the [114] first when I knew John Harrah.

Mr. Davis: Mr. Reporter, will you please read the question?

(The reporter read the following question: "Your employment with William Harrah and your contact in a business way with John Harrah has all been since his petition in bankruptcy was filed?")

Q. Do you understand that question, Mr. Brown?

A. Why, it must have been.

Mr. Davis: I think that is all.

The Referee: Step down. Come along, Mr. Harrah.

JOHN HARRAH,

called as a witness on behalf of the petitioning creditors, being first duly sworn, testified as follows:

The Referee: What is your name, sir?

A. John Harrah.

Direct Examination.

By Mr. Davis:

Q. What is your business, Mr. Harrah?

A. Why, I'm professionally an attorney. I have been in lots of businesses in my lifetime.

Q. Are you now practicing law?

A. Call it a restricted practice.

Q. Well, would you tell us what you are doing other than [115] practicing law, then?

A. Well, at the present time I'm watching the Abbot Kinney affairs as a director and am interested with my son, who has a large bond interest. Most of my activities at present are for other things for him. He calls me to Reno every couple of weeks about propositions he has there, and he sends me to Vancouver, Washington, every once in a while, where he has an interest up there.

Q. Do you have any businesses of your own that are in your own name?

A. I have no businesses of my own, in my own name or any one else's.

Q. And do you have any assets of your own in your own name?

A. I have no assets at all to any extent other than a little bit of money and personal effects.

(Testimony of John Harrah)

Q. Now have you carried on any business activities on your own behalf and in your own name since the petition in bankruptcy was filed against you?

A. No. That wasn't filed against me. That was a voluntary petition.

Q. Since you filed your petition in bankruptcy?

The Referee: Let us see when it was. When was it, Mr. Harrah?

The Witness: I think it was April 13, 1937.

Mr. Davis: That was the date of the filing of the petition? [116] A. Yes.

Q. And have you ever received a discharge in that proceedings? A. No.

The Referee: Q. Did you apply for a discharge?

A. Yes, I applied for a discharge.

Q. What disposition was made of the application?

A. A report was made on it by the Referee; and it never came up for a hearing before the Referee.

Q. What report did the Referee make?

A. The report was adverse.

Q. He recommended the discharge be denied, and the matter never came on for hearing before the District Court?

A. It was on calendar and then went off and then was reset and never did come on for rehearing.

Mr. Davis: Q. And at that time there was substantial evidence about your relationship with Charles Brown, was there not?

A. Very little. I never had but one business transaction with Charles Brown that came up there.

Q. What was the basis for the report of the Referee denying the discharge?

(Testimony of John Harrah)

Mr. Cobb: We object to that on the ground that the report would be the best evidence; it is incompetent, irrelevant, immaterial.

The Referee: Sustained. [117]

Mr. Davis: Q. Since that time, you have devoted all of your time, effort, and energies to the business of your son, William Harrah?

A. No, no. No, I haven't.

Q. Have you had any source of income other than William Harrah's businesses? A. Yes, I have.

Q. What other activities have you carried on, Mr. Harrah?

A. Well, there was the practice of law. I did a general practice for a while, and—

Q. You have not maintained a law office, have you, Mr. Harrah, for many years?

A. Well, let's see, I haven't maintained an exclusive office ever. I have always done other things, but I am just trying to think and remember back how—when I started taking up general practice.

Q. You have not practiced law since I have known you, have you, Mr. Harrah, and that has been since 1937?

A. I was practicing at that time, 1937—1937? Let's see, no, I wasn't. I got started practicing again about 1932, when I went broke. And I tried to build up a practice and I worked at it rather exclusively for some time. And then I wasn't very successful in a financial way in my practice; so when my son's interests became more extensive, I started in to working for him. He put me on his payroll, I think, about, oh, perhaps 1935 or 1936, something like that. [118]

(Testimony of John Harrah)

Q. How long have you been connected with the Abbot Kinney Company?

A. Well, since I was appointed a director, December 23, 1927.

Q. And you have continuously been a director of the Abbot Kinney Company since that time?

A. Yes, I have.

Q. And you are a director of the Abbot Kinney Company now? A. Yes.

Q. You have opposed all of the proceedings, the authorization of any proceedings, to recover this money from Mr. Brown, have you not?

A. No, I have not.

Q. In all of the Board of Directors' meetings, whenever the question of voting came up on this litigation, you have voted against further action against them, have you not?

Mr. Cobb: We object to that on the ground first, that it is a compound question, second, that the minutes of each particular meeting and how the motion was worded would be the best evidence.

Mr. Davis: I will withdraw the question.

Q. Did you serve upon the Executive Committee of the Abbot Kinney Company? A. Yes, I did.

Q. And when were you appointed a member of that Executive [119] Committee?

A. Well, I think we have agreed it was 1940. I don't know whether it is correct or not, but it is as nearly as I can remember without checking up the record. I think you have the minutes of the Directors' meetings there, which would show.

(Testimony of John Harrah)

Q. I think that is close enough, January, 1940. Now who were members of the Executive Committee of the Abbot Kinney Company during the time you served on it?

A. I don't remember whether there was any change from the time I first got on it or not. I don't remember any. As far as I remember, they were the same three.

Q. Who are "they?"

A. Carleton Kinney, Al. Newton, and myself.

Q. How long did you serve as a member of the Executive Committee?

A. Well, I served until early in December last year, 1944.

Q. Now what authority did the Executive Committee have so far as the activities of the Abbot Kinney Company were concerned?

A. To carry on the business of the company between the meetings of the Board of Directors.

Q. And did the Executive Committee do that?

A. They did.

Q. Did they execute or authorize the execution of leases? A. Yes. [120]

Q. And authorized the payment of moneys?

A. Yes.

Q. Were you authorized to sign checks on behalf of the Abbot Kinney Company?

A. Yes, it required two signatures; and mine was one. At lease my own was one that was good. I don't know how many were authorized, but it required two signatures on a check.

Q. And Carleton Kinney was also authorized—

A. Yes, he was.

(Testimony of John Harrah)

Q. So that you and Carleton Kinney could sign checks on the Company? A. We could.

Q. You were an officer of the company in addition to being a member of the Executive Committee and a member of the Board of Directors, were you?

A. I was treasurer.

Q. How long were you treasurer of the company?

A. Well, I don't remember; several years.

Q. Now during the time you were a member of the Board of Directors of the Abbot Kinney Company, an officer, and a member of the Executive Committee of the Abbot Kinney Company, the Abbot Kinney Company claimed that your son William Harrah and your daughter Margaret Schroeder owed the company approximately between sixteen and eighteen thousand dollars on the Plaza Building; isn't that correct?

Mr. Cobb: We object to that on the ground that it is [121] incompetent, irrelevant, and immaterial; has no bearing on the issues in this case; and is not the best evidence.

The Referee: How is it going to help us, Mr. Davis?

Mr. Davis: Nothing other than to show, your Honor, that this was a general scheme which Mr. Harrah and Carleton Kinney worked out so that Carleton Kinney would get certain moneys, Mr. Harrah or his family would get certain moneys, and this was part of the pay-off—apparently, as we see it. We are trying to develop it from the things that they did. As you know, a conspiracy is sometimes shown and most often shown by the circumstances. We are going to show that John Harrah voted, as a member of the Executive Committee, to settle an obligation of his daughter and his son to the company of

(Testimony of John Harrah)

between sixteen and eighteen thousand dollars, an obligation which he went out and paid \$6200 for—and at the same time voted to allow Carleton Kinney to pay off an indebtedness of \$1500 for a bond which he paid around \$625 for, and that then this bond transaction came along and Mr. Carleton Kinney and Mr. John Harrah voted down the line. I think it is all part of the chain of circumstances.

Mr. Kitzmiller: To which we are going to object. And in making the statement in regard to this so-called conspiracy—

The Referee: Counsel, you know very well, as a lawyer, that statements are not evidence. Make your objection.

Mr. Kitzmiller: I object to it, then, on one further ground, that such a transaction would not tend to prove any- [122] thing because Mr. Davis has done the same thing with regard to bonds. As long as attorneys are going to give evidence here—

The Referee: I wish you gentlemen would behave yourselves like lawyers and not litigants. If you have made a legal objection, it will be sustained. Proceed.

Mr. Davis: Q. Are you acquainted with Hugh Darling? A. I used to be.

Q. When did you first meet Hugh Darling?

A. I think I first met him about the time that I went on the Board of Directors. He was representing the Cruickshank Company at that time.

Q. Mr. Darling is a lawyer and a member of the firm of Guthrie and Darling, as I understand it?

A. I don't know his firm. I know he is an attorney.

(Testimony of John Harrah)

Q. Now he represented Cruickshank and Company?

A. Call it Red West. A man they called Red West owned Cruickshank, and Hugh Darling represented him.

Q. At the time you met Mr. Darling, how much money was owed on the sprinkling system contract?

A. I think \$137,000 and some accrued interest, is my recollection.

Q. How long had that \$137,000 been owed on the contract?

A. I don't remember that. I don't know the date of the last payment. The last payment was before I was on the Board of Directors. [123]

Q. Well, as a matter of fact, Mr. Harrah, you know of your own knowledge, by subsequent investigation, that nothing had been paid on the contract since about 1932; isn't that so?

A. I never investigated it. I knew that nothing had been paid after—I went on the Board of Directors. I didn't know when the last payment was.

Q. You recall that, when Mr. Darling came before the Board and requested a renewal and execution of that supplemental agreement, he stated nothing had been paid on it for many years; do you recall that?

A. Well, I don't recall what was said at that time. I recall that he came before the Board and that somebody had a supplemental agreement prepared which was submitted and it was considered by the interested parties at the time they were contemplating signing an agreement regarding \$196,000 in bonds which were owned by Frank Williams, Robbins, and William Harrah and certain corporate stock on the Abbot Kinney Company which you and your brother and, I believe, Mr. Al. Newton owned—

(Testimony of John Harrah)

or perhaps your father instead of you; and it was embodied in that contract that that would not be effective unless Cruickshank and Company executed their supplemental agreement within 30 days, as I remember—and that was setting up new terms of payment, was the principal item in it—and of course renewing the obligation then so far as the statute of limitations was concerned.

Q. Do you recall when the reorganization of the company [124] took place pursuant to that agreement of December 23, 1937, that Mr. Darling went on the Board of Directors—

A. He went on the Board of Directors, but there wasn't any reorganization of the company.

Q. I said pursuant to that agreement. At the time you went on the Board, then.

A. My recollection is Mr. Darling went on about that same time, possibly the same day. He went on to represent the Cruickshank interests.

Q. And Mr. Darling demanded payment many times on account of that sprinkling system contract, did he not, during the time he was on the Board of Directors?

A. I don't remember of him ever making any formal demand; but he often brought it up and discussed it with the directors as to when he could get some money paid on it.

Q. As a matter of fact, every meeting Mr. Darling attended virtually, he wanted to know when we were going to pay something on account, did he not?

A. I don't remember it that way. As I remember, he was very, very conscientious and very interested in all the affairs of the company as a director.

No. 11397

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E. A. GERETY, WILLIAM HARRAH, CHARLES
BROWN and HAROLD POOL,

Appellants,

vs.

ABBOT KINNEY COMPANY,

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TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME II

(Pages 305 to 615, Inclusive)

Upon Appeal from the District Court of the United States
for the Southern District of California,
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OCT 25 1915

PAUL P. O'BRIEN,
CLERK



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(Testimony of John Harrah)

Q. What did you say, if anything, when Mr. Darling made a request for payment on account of the contract?

A. Oh, I don't remember what anybody said specifically; but I remember the general attitude was that the company wanted to pay them as fast as they could but they didn't have [125] any money to pay them with. The company was not profitable, the operation.

Q. As a matter of fact, the company was in default of its bonds and had been in default of its bonds since 1932, had it not? A. And still is.

Q. It hasn't paid anything on its bonds since 1932?

A. 1932 is correct.

Q. And it was also deeply indebted on account of taxes on the property?

A. Well, at some times in the past—there have been times when the tax situation was bad. But it has been pretty well cleared up now.

Q. When you say it has been pretty well cleared up, you merely mean as to its properties which you consider as of value to the company?

A. Well, yes, there are some properties down there that were not ever profitable; that is, for many years, that the taxes have grown greater than the value of the property, in my opinion.

Q. Now as a result of this outstanding indebtedness, didn't you often state that in your opinion the Cruickshank Company contract had no value?

A. No, I don't think I ever stated it had no value.

Q. Just what did you state about that, then?

A. Oh, I don't know. I talked about the Cruickshank [126] contract many times with different people. I don't remember what I stated at different times about it; that

(Testimony of John Harrah)

is, at most of the times. I remember what I stated to Charley Brown when he asked me about it, as far as—

Q. What have you told in Directors' meetings regarding its value?

Mr. Cobb: I object on the ground that it is hearsay and inadmissible as far as Mr. Brown is concerned.

Mr. Davis: Mr. Brown is a party.

Mr. Cobb: Mr. John Harrah has quitclaimed any claims he has, and it would not be admissible against Mr. Brown or Mr. Gerety that this man might have declared or had an opinion at one time as to the validity or invalidity of the contract. And if the other parties were not there, it would be hearsay.

Mr. Davis: If your Honor please, Mr. John Harrah is a party to this. The fact that he disclaims an interest does not mean that he has been relieved of any—

The Referee: I don't think so, Mr. Cobb. The evidence shows that Mr. Brown sold half of his interest in this contract to Mr. Harrah's son for \$3,000, and a part at least of the negotiations for that transfer was handled by Mr. John Harrah. No, the objection is overruled. But try to make your questions as specific as you can, Mr. Davis.

Mr. Cobb: May I say this, your Honor: I will not object to anything that occurred after that date; but I do object to going back since 1937, before there was any such relationship. [127] Counsel charges conspiracy. I think he ought to state when the conspiracy was entered into so that we could have some date that we could tie our objections to, not go back to—

The Referee: It is not merely a question of conspiracy. If it be shown that any one in a fiduciary relation-

(Testimony of John Harrah)

ship to this corporation purchased a claim against the corporation, then that person may be allowed only what he paid for that claim.

Mr. Cobb: I am not arguing that question; but he is calling for something that occurred in a Directors' meeting when Mr. Davis and Mr. Harrah were talking about this contract, when none of the respondents was present.

The Referee: That doesn't make a bit of difference. It is all a part of the general question. If it be shown that the witness John Harrah took one attitude toward this contract while it was in the hands of the Cruickshank Company and took another attitude when it was in the hands of Charles Brown, who concedes that he held it in trust partially for the general manager of the company, that may be a very important circumstance. The objection is overruled. Go ahead, Mr. Davis. Make your questions as specific as you can.

Mr. Davis: Q. Is it not a fact, Mr. Harrah, that every time the Cruickshank Company contract was discussed in the meetings of the Board of Directors of the Abbot Kinney Company you always stated that in your opinion the Cruickshank Company contract was not worth fussing with or having anything [128] to do with?

Mr. Cobb: We object to that on the ground that the question is leading and suggestive and that no proper foundation has been laid.

Mr. Davis: After all, Mr. Harrah is an adverse—

The Referee: You have not called him as an adverse witness.

Mr. Davis: I think that we have, your Honor.

The Referee: No, you have not. You called him as your own witness.

(Testimony of John Harrah)

Mr. Davis: I did not intend—

The Referee: I don't care what you intended. I am talking about the record here.

Mr. Grainger: I understand that in the Bankruptcy Act there is no provision in there saying—

The Referee: We operate under the rules of federal procedure.

Mr. Grainger: 21-J—

The Referee: You may, but he has not done it. He has not said anything about 21-J or an adverse witness.

Mr. Grainger: I don't think you have to make the request.

Mr. Davis: That being the case, I would like to call Mr. Harrah as an adverse witness. At this time I relieve him from my call and would like to call him as an adverse witness, as a party to the litigation.

The Referee: Let us find out what the procedure is.
[129]

Mr. Cobb: We object to that on the ground, since the witness has disclaimed, he is not a proper party to call as an adverse witness. That ruling has been extended where you are limited only with respect to officers of a company as well as agents of the particular parties named in the statutes, because it is contrary or an exception to common law and it is purely statutory.

Mr. Grainger: My understanding of the purpose of that 21-J is to extend it to those who are—

The Referee: (Reading:

“In any proceeding or controversy, or in any plenary suit, brought under this Act, if it shall appear that the interest of a witness is adverse to the party calling him,

(Testimony of John Harrah)

such witness may be examined as if under cross-examination and the party calling him shall not be bound by such testimony.”)

Mr. Davis: That is correct, your Honor.

The Referee: But “if it shall appear that the interest of a witness is adverse to the party calling him, such witness may be examined as if under cross-examination and the party calling him shall not be bound by such testimony.”

Mr. Cobb: There wasn’t any evidence here at all—

Mr. Davis: It certainly appears that it is adverse. The mere fact that he has stated that he does not have any interest will not be followed through by the evidence. In other [130] words, he is representing—

The Referee: Before you can examine him as an adverse witness, that has to appear.

Mr. Davis: Your Honor, I think it is appearing.

The Referee: In what way?

Mr. Davis: We intend to show by Mr. Harrah that he in fact, through William Harrah, is participating in this. I think the evidence up to this point has shown that William Harrah is participating in it. I think all of the inference that will necessarily be drawn from the evidence is that Mr. William Harrah had his interest in the first instance; that John Harrah, in control of the Executive Committee, voted to give William Harrah, Edward Gerety, and Mr. Brown this contract for the purpose of defrauding the company.

Mr. Cobb: Let us lay some foundations for these statements.

The Referee: Can you prove your allegations in your petition, that Mr. John Harrah voted against the propo-

(Testimony of John Harrah)

sition to pay the Cruickshank Company \$10,000 in full settlement of their contract?

Mr. Davis: Yes, by Mr. Harrah's own admission.

The Referee: Can you prove that Mr. John Harrah voted to pay Mr. Brown \$7500 and \$30,000 on that contract?

Mr. Davis: By his own admissions.

The Referee: If you can prove those things, you may be in a better position here. [131]

Mr. Davis: I was just getting up to that.

The Referee: Well, prove that first, because under this Section you have got to show his interest is adverse before you can cross examine him as an adverse witness. All right, go ahead.

Mr. Davis: Q. You were a member of the Executive Committee that met on the 20th day of June, 1944?

A. I presume so. I was a member of the Executive Committee at that time.

Q. And you voted at that time to pay Mr. Charles Brown the sum of \$7500 on account of the Cruickshank contract? A. Yes, I did.

Q. And you knew at that time that Charles Brown had only paid \$15,000 for the contract?

A. I think he told me that's what he paid for it.

Q. And you voted on November 7, 1944, after the petition in bankruptcy had been filed, to pay Mr. Brown \$30,000 on account of the Cruickshank contract?

A. I did.

Q. You voted for the payment of the \$30,000 at that time? A. I did.

(Testimony of John Harrah)

Mr. Davis: I can introduce these minutes in evidence, your Honor; but I don't think they are necessary.

The Referee: What about the Cruickshank offer? You have not proved anything on that.

Mr. Davis: Q. In January of 1943 did Mr. Al. Newton [132] present to the Executive Committee at a meeting at which you and he were present an offer of the Cruickshank Company to settle the obligation of the Abbot Kinney Company to the Cruickshank Company in the sum of \$137,000 for \$10,000?

Mr. Cobb: We object on the ground that it is too remote. January, 1943, has no bearing on the issues of this case and is hearsay as far as Mr. Brown is concerned.

The Referee: Overruled.

The Witness: I will tell you what he did do.

Mr. Davis: Q. I will call your attention to the minutes of the regular meeting of the Executive Committee on January 14, 1943, and ask you if this is your signature? A. Yes, that is my signature.

Q. And you signed those minutes? A. Yes.

Q. I would like to read the minutes to you and ask you if these are minutes of the actual matters that took place at that time:

"The offer of H. S. West to cancel the sprinkler contract for the sum of \$10,000 was proposed by Al. Newton who voted for the acceptance of the proposition. John Harrah voted no on the proposition."

Is that actually what took place at that time?

A. Not strictly.

Q. Just what did take place at that time? [133]

A. Well, it was one of our regular meetings; and Al. Newton was present and I was present. Carleton Kinney

(Testimony of John Harrah)

was absent. I see I signed the minutes, but I was not there. So Al. said—I don't know whether he said Phil or Tom, meaning you or your brother, one or the other—had been talking to Hugh Darling and Red West, and that he had obtained from them an option to buy that contract for \$10,000, and that you had had the option—as I remember now, he said—either ten days or two weeks. And he said the option had expired that day, I believe he said. The meetings were held in the afternoon. But he said that you had obtained an oral option for the rest of the day and he thought the company ought to buy it.

I said, "Well, it would be all right; but what is the company going to buy it with?"

We asked how much money they had on hand. The bookkeeper reported about \$2,000. Al. said, "We can raise the money somewhere."

I says, "Where can we raise it?" I says, "Will you put up your part of it"?

He says, no, he couldn't put up any money right at that time.

I said, "What are you going to buy it with, then? What terms do they want?"

He said, "All cash."

While we were talking, the phone rang; and Mr. Lou Halper [134] was on the phone, who was a director of the company. And Mr. Gerety, who was there, called me and I answered the phone. And Lou Halper said that—mentioned one of the Davis's, which I don't remember now, yourself or your brother—phone and said the Cruickshank Company contract could be bought for \$10,000. He said, "There is no money to ever pay on that contract." is what Lou Halper said. And he said, "I am not in

(Testimony of John Harrah)

favor of it being done" and said, "I talked to Frank Williams a number of times about it, and I know that's his sentiment."

"Well," I said, "if it can be bought for \$10,000, who is going to put up the money? The company only has \$10,000."

Lou says, "Nobody."

So that was practically it. And Al. said well, he wanted to make a motion, wanted to reverse himself as being in favor of it.

I says, "All right, then, you vote yes on it and I will vote no."

The Referee: You may cross examine the witness.

Mr. Davis: Thank you, your Honor.

Q. Is it not a fact, Mr. Harrah, that at all of the meetings of the Board of Directors of the Abbot Kinney Company, whenever this question of the payment of the obligation to the Cruickshank Company was considered, you always stated that the contract was subordinate to the bonded indebtedness and to the taxes, and that in your opinion it had no value upon [135] which the company should pay any money.

Mr. Cobb: We object to that on the ground that it is a compound question; that it covers a period beyond any of the issues involved here; that it is leading and suggestive; and that it does not tend to prove or disprove any of the issues in this case.

The Referee: All objections are overruled except the objection that it is a compound question. That is sustained. Mr. Davis, make your questions as simple as you can, one point at a time.

(Testimony of John Harrah)

Mr. Davis: Q. Is it not a fact, Mr. Harrah, that you stated at the Board of Directors' meetings of the Abbot Kinney Company that you did not believe the Cruickshank Company contract had any value so far as payment by the Abbot Kinney Company was concerned?

Mr. Cobb: We object on the ground that it is compound. They have had meetings since 1937 every week, and how are we going to call in a witness to testify on what occurred at a particular meeting and what was said and done at each particular meeting? The court can draw its own conclusions in a summary of the—

Mr. Kitzmiller: We make the further objection that no foundation has been laid for the particular question.

Mr. Davis: This was a statement made at every single meeting we had, at every—

The Witness: No, that is not true. [136]

Q. What did you say regarding the value of the Cruickshank Company contract so far as payment of money by the Abbot Kinney Company on its account—

Mr. Cobb: We object on the ground that the proper foundation has not been laid and, further, on the ground that the question tries to limit it to a particular phase of the subject sought to be inquired about and does not permit the witness to give the whole conversation. I submit that we are entitled to have a foundation laid as to who was present and what was said by what parties.

Mr. Kitzmiller: Especially the time.

The Referee: The objection is sustained. However, the questions now are limited to things which were said at formal meetings of the Executive Committee of the corporation; therefore no foundation need be laid as to who was present.

(Testimony of John Harrah)

Mr. Davis: If your Honor please, these are the Directors' meetings.

The Referee: Oh, Directors' meetings?

Mr. Davis: Yes. I was never present at—

The Referee: All right, Directors' meetings. There need be no foundation as to who was present. Counsel may inquire from this witness first as to whether he held a consistent attitude with respect to those payments, those payments by the Abbot Kinney Company on the Cruickshank contract. If his answer is that he held a consistent attitude, then counsel may inquire as to what that attitude was as formally expressed [137] by the witness at the Directors' meetings. Proceed.

Mr. Davis: Q. Did you, Mr. Harrah, express a consistent position as to the payment on account of the F. R. Cruickshank Company in the meetings of the Board of Directors?

Mr. Cobb: We object on the ground that it is ambiguous as to "consistent," and that—

The Referee: "Consistent" means did he continuously advocate the same course of treatment or the same position, or did he at some time or other change his position. The objection is overruled.

The Witness: Yes, I maintained a consistent position.

Mr. Davis: Q. Now what was that position which you maintained.

Mr. Cobb: We object on the ground that it calls for the conclusion of the witness and that no proper foundation has been laid.

The Referee: Well, we will interpret the question to mean the substance of what he said. The objection is overruled.

(Testimony of John Harrah)

Mr. Cobb: And when, your Honor? I mean, that is important.

The Referee: The time is whenever the matter came up for discussion at the Directors' meetings at which Mr. John Harrah was present.

Mr. Cobb: I object to any time before there is any charge that Mr. Brown had anything to do with this contract. [138]

The Referee: The objection is overruled. Proceed.

The Witness: Well, there was—that sprinkler contract was not mentioned in many Directors' meetings. In fact, your records will show that there weren't many Directors' meetings. There were very few over the period of the last four years, I would say.

Mr. Davis: Q. Between 1937 and 1941—we will limit our time to those years to start with now—

A. I don't know how many Directors' meetings there were. There weren't many then.

Mr. Cobb: I want to interpose an objection to that period of time. It is too remote. It has no bearing on the issues of this case, what he might have thought in 1941 or 1944, when they charge that this was acquired under a conspiracy. It is too remote to have any bearing on the issues here.

The Referee: Overruled. Go on.

The Witness: 1937 to 1941?

Mr. Davis: Q. Yes.

A. During that time it was brought up oftener than it was afterwards. In fact it was brought up occasionally by Hugh Darling, because I think he was on the Board of Directors all that time. And what I said at the time

(Testimony of John Harrah)

was when the company had any available money, they would pay money to them. Hugh Darling mentioned at the time—right at that time when I went on the Board of Directors, when that bond and stock [139] contract was signed, that another agreement was prepared and which he wanted executed—my recollection is—I have no distinct recollection of it being executed—wherein all the parties to that agreement agreed to, as far as we possibly could, make the payments on that proposed supplemental sprinkler contract in the amounts and at the times they were to be made. He mentioned that, and they all agreed, orally at least, that they would do that. The discussion during that period of time always was to the effect that the money was needed to pay the taxes and not let the taxes on the operative property get any farther back, any farther than possible, so as to avoid those penalties, which accrue very rapidly. And the discussion when Hugh Darling was not present—and those discussions usually were of a broader nature—they would consider then the value of the real property as an amusement pier and also the prospects of selling a right of way through there, which had been worked on for many years, for a large sum of money. And that was more—they figured out the ultimate value of these things, my statement at that time being, I think, practically the statement of most all the directors, that upon the sale of this for amusement purposes that the property wouldn't even pay off the bonded indebtedness or there wouldn't be anything left to pay a sprinkler contract or to go to the stock of the corporation.

Q. As a matter of fact, you made that statement many [140] times, Mr. Harrah, that it had no value

(Testimony of John Harrah)

so far as the assets behind the Cruickshank Company contract—

A. Why, I may have made that—I don't know how many times; but when it has come up for discussion, it was my opinion, and I think the general opinion of the Directors, except for being bailed out by some sale like that which had been worked on a long time, that property wouldn't even pay off the bonds and the interest. So that ultimately the Cruickshank contract—or the stock, neither one, if there was a forced sale or foreclosure under the bond issue that there would be nothing left for it.

But it was considered it had a value in that it would still—the owner would still have it and whoever acquired the property afterwards—there was a discussion about it. Some people weren't quite certain about it—that whoever owned the property afterwards would lose the sprinkling system. It could be removed or he would have to make some deal with the owner. There wouldn't be any charge against anybody, of course. So there was a lot of discussion about it, the value depending on the way things would work out and what the income of the company would be, whether there would be any money to pay them or there wouldn't be any money to pay them, and also as to whether Hugh Darling and Red West would be insisting on payments.

Q. As a matter of fact, Mr. Darling several times stated that he was going to pull out the sprinkling system and you [141] and the other directors told him that it was their opinion that, including myself—

A. You were not a director.

Q. But I was there at the Directors' meetings, if you recall, most of them at that time—that the contract, we

(Testimony of John Harrah)

felt, was subordinate to the bonds and that he couldn't take out the sprinkling system.

A. I never told him that. I never had that idea or that belief whatever.

Q. Wasn't that stated several times to Mr. Darling?

A. I don't think so. I have no recollection of anybody ever making that statement in a Directors' meeting to Mr. Darling. The only statements I heard made in his presence was that the company would pay him whenever they had any money to pay but that the little money they were getting—that they all felt it was much more important to pay on taxes rather than on the sprinkling system. And in his absence, when we discussed it, I know it was mentioned that as long as they would sit still and not cause any trouble it was surely better to pay the taxes and not pay them anything.

Q. Wasn't it also stated when he was not present that we didn't believe he could take out the sprinkling system in view of the fact that it had become a fixture?

A. I never said that, I never believed that.

Q. You never made the statement that for that reason you would not advocate paying anything on the sprinkling system [142] contract? A. No.

Q. And you never made the statement that for that reason you would not authorize the company to buy the sprinkling system contract?

A. No, no, the only time the purchase ever came up, as far as I know, was the time I mentioned, when Al. Newton—

Q. Is it not a fact, Mr. Harrah, that in 1941 I also got a tentative offer from Cruickshank Company to sell

(Testimony of John Harrah)

the contract for around \$50,000, and that that offer was considered by the members of the Board of Directors?

A. I never heard of that.

Q. Is it not also a fact that Mr. West went out and talked to Frank Williams, trying to get the company or Mr. Williams to buy an interest, a one-half interest, in the Cruickshank Company contract for \$25,000?

A. Mr. Williams—I know what Mr. Williams told me. He told me that Red West went out to Hollywood Park during the races—some four years ago or five, as I remember it—and talked to Frank and offered to sell him the contract for \$50,000, and that Frank turned him down on it and that then at the same time or a few days later he offered to sell him a half interest in it for \$25,000 and Frank said that he didn't take it.

Q. When the offer was made to the Executive Committee to buy the contract for \$10,000, is it not a fact that you [143] made the statement at that time that you could always buy that contract for practically your own terms and it wasn't worth spending any of the company's money for it?

A. No, I didn't make that statement, no.

Q. And that you would not recommend the payment of any money for the purchase of the contract at that time?

A. No, I didn't say that. I told you what I said.

Q. Now, Mr. Harrah, calling your attention to some time around the first week of June, 1944, is it not a fact that Al. Newton came down to the Abbot Kinney Company office on the date—on a Tuesday, I believe it was—on which your regular Executive Committee meetings were to be held and stated to you at that time that Phil

(Testimony of John Harrah)

Davis had an option to purchase the Cruickshank Company contract and that he felt the company ought to buy it for the \$10,000?

A. No, Al. Newton never mentioned it to me except that one time I testified to. He has never said a word, and neither has any one else ever said a word, about it being offered to the company or—

Q. And is it not a fact that he further told you at that time that Phil Davis had told him that Hugh Darling had just phoned and stated that some one was negotiating on the contract and that if we didn't act by the next Monday Mr. Darling would feel no responsibility to Phil Davis, and that he would go ahead and negotiate with these people?

A. No, he never mentioned the contract to me from [144] January, 1943.

Q. And is it not a fact, further, Mr. Harrah, that at that time you told Al. Newton you did not think the contract was worth anything, and that you were sure no one would buy it, and that therefore you would not have anything to do with it?

A. In June, 1944?

Q. In June, 1944.

A. No, on the contrary I had advised a lot of people to buy the contract several months prior to that time.

Q. Were the persons you advised to buy it Mr. Charley Brown and your son William Harrah, and Eddie Gerety?

A. No.

Q. Did you have a conference with Mr. Charley Brown in which you advised him not to buy it?

A. I don't know whether you would call it a conference or not. He asked me—I guess it could probably

(Testimony of John Harrah)

be dignified by that term—he asked me what I thought about it. He said Eddie Gerety wanted him to go in with him and buy that contract.

So I said, “How much will you have to pay for it?” He said Eddie thought he could get it for \$15,000, he wasn’t sure. That is the way I remember it.

So I said that—then I probably didn’t have the exact amount on the end of my tongue, I don’t think I did—but I said over \$100,000 had been due on it for a long time and [145] the company hadn’t paid anything on it for years, that they didn’t have anything they could pay on it. I said if they got very insistent they might have got a little money along, let some of the taxes go and paid some on the sprinkler contract.

Q. You told Mr. Brown that?

A. Yes, because it was necessary for the property to have a sprinkler contract.

Q. You told Mr. Brown—

A. I told him a lot more. Do you want me to tell you what I told him?

Q. Yes.

A. I said I thought the pier would unquestionably burn down, because we had had innumerable fires there that the sprinkler system had extinguished; and I said that Hugh Darling had represented Red West there and tried to get money on it and the company had promised to pay him, but the way the finances of the company were there wasn’t any money to pay him; that is, we thought it was more important to take care of the taxes.

Q. What date was this you had the conference, Mr. Harrah?

A. That isn’t all I told him.

(Testimony of John Harrah)

Q. But I would like to know the date.

A. Well, I don't know the exact date, but my recollection is it was, oh, two or three weeks before he told me that they [146] had bought the contract.

Q. All right, go ahead now.

A. And I said that at one time Al. Newton said it could be bought for the company for \$10,000 but at that time the company didn't have any money, only had a very small amount of money, and they didn't buy. And I told him once it had been offered to Rusty for \$50,000—that's what we called Mr. Williams.

And I said, "The contract is all right, the company owes the money; but the big question is how much you can get on it. You can only get what the company has to pay on it. And if the bond issue were foreclosed, which I assumed it would be if anybody bought the contract, and undertook to keep taking the money from the company, that the company might accumulate from time to time, that then he couldn't get any more money on it—he might still own the sprinkling system, after the foreclosure and if he did own it, he would have to deal with the new owners of the property, but they wouldn't be obligated to pay him anything. Then I said the probability was it would be foreclosed, they would start a foreclosure as soon as they knew he bought it.

Q. What made you think they might start a foreclosure just as soon as Mr. Brown had bought it, Mr. Harrah?

A. I haven't finished telling you what I told him yet.

(Testimony of John Harrah)

Q. Well—

The Referee: Come on, let us get along here now. The [147] witness is relating the conversation. What he thought is immaterial.

The Witness: I told him that a few months before that that Frank Williams and Lou Halper, who represented E. I. Robbins in the bond and stock contract, and myself, who represented William Harrah in the bond and stock contract, had discussed the thing, and that they had decided among themselves that it would be a good thing for them to acquire the sprinkler contract and that Lou Halper was authorized to deal with Hugh Darling and see if he could get it.

“But,” I said, “it has been two or three months; and Lou made two or three reports that he hadn’t had any success or something like that, and nothing came of it.”

And—“But,” I said, “that—they would be, in my estimation, in a much better position to own it rather than Charley Brown, Eddie Gerety or anybody who had no connection with that bond agreement, because the bond agreement couldn’t very well be foreclosed—the bonds couldn’t very well be foreclosed unless the parties to that agreement or some of them consented to it, probably applied for it—so that it probably wouldn’t be foreclosed out from under; anyhow the bondholders naturally would want to come in and enforce the claims just to keep the money from their company going to the sprinkling contract. So I don’t think you can probably any more than get your money back, you would be lucky if you did for that reason.” [148]

(Testimony of John Harrah)

I says, "If I were you, I wouldn't go in the deal." That was practically it.

Q. What did Mr. Brown say to you?

A. Oh, he said—he said Eddie—he said some attorney had advised Eddie that it was a good thing to buy; and he said he and Eddie had talked it over quite a little. I think that is about all he did say. He didn't say whether he was going to buy it or whether he wasn't, as I remember it.

Q. Did you contact any members of the Board of Directors then to find out whether the company should make an effort to go out and buy it?

A. No, I did not.

Q. Prior to that time, about two or three weeks before that time, the notice of a special meeting of the Board of Directors of the Abbot Kinney Company had been sent out to the directors, had it not?

A. Well, there was a notice sent out calling a meeting for May 3, 1944, as I remember it.

Q. Yes, and at that time the Board of Directors was composed of whom?

A. Composed of Helen Kinney Ward, Carleton Kinney, Tom Davis, Al. Newton, Lou Halper, and myself.

Q. And of those six members Helen Kinney Ward was back in Oklahoma, was she not?

A. Kansas, one or the other.

Q. So that there were five members within the State of [149] California? A. Yes.

Q. And of those members three of them composed the Executive Committee? A. Yes, they did.

(Testimony of John Harrah)

Q. Now at that time did you or Mr. Carleton Kinney appear at the designated place to hold a meeting of the Board of Directors?

A. I didn't. I don't know whether they did or not.

Q. As a matter of fact, you know of your own knowledge, from what we told you immediately thereafter, that Mr. Carleton Kinney had not appeared?

A. I know from that. But I wasn't there; so I don't know who was there.

Q. And you know we could not constitute a quorum to remove the Executive Committee; is that so—or to carry on any business of the Abbot Kinney Company?

A. That was my belief. I didn't want to hold a meeting unless all of the directors were there. But according to what I heard right after it, you claimed you had held a meeting and abolished the Executive Committee and the manager and many other things.

Q. As a matter of fact, Mr. Harrah, as we left the designated place, the principal office of the company in Venice, we met you at the entrance to the pier and asked you to meet with the Board for the purposes of carrying on the [150] business and you absolutely refused, did you not?

A. Tom Davis asked me to get with them; and I said, "No, I won't meet unless there is a full board."

He says, "We are going to hold a meeting right here."

I says, "You will hold it without me. I am not meeting with you." So I walked away.

Q. As a result you and the other members of the Executive Committee continued with the power which had been allocated to you to continue operating the affairs

(Testimony of John Harrah)

of the company during the period when the Board of Directors did not meet?

The Referee: Go ahead, Mr. Davis. This is a lot of conversation. Let us get some evidence.

Mr. Davis: Q. How long have you known Charley Brown?

A. I think I got acquainted with him right after he came to Venice.

Q. That was 1919? A. I think so.

Q. Have you had any business dealings with him?

A. Well, the only business dealings I ever remember having with Charley Brown I once sold him the equities in four houses in Los Angeles; that is, there weren't any equities, but I held title to them. And he gave me \$500 for them, and the mortgagees all took them away from him.

Q. After you filed a petition in bankruptcy, did Mr. Brown start representing your son William Harrah in various [151] matters? A. No.

Q. When did he start representing your son William Harrah in matters—

Mr. Kitzmiller: Assuming he did.

The Witness: I don't know whether he ever did. He worked for him several times.

Mr. Davis: Q. When did he start working for William Harrah?

A. The first I have any recollection on now I think was in 1935.

Q. What was that employment?

A. Well, my son and daughter had some games in the Plaza Building in Venice; and that was during prohibition. And they had a little bar there in the building

(Testimony of John Harrah)

and they gave some of their patrons free drinks. So Bill Harrah had Charley Brown to look after that. As far as I remember, that is the principal thing he did. I don't know whether he did anything else or not. But I remember he did that. It was a little more interesting there with the beer in it, and those customers of the games who liked to drink once in a while would be invited in and he would give them a drink or two.

Q. Now at the time Charley Brown obtained the lease on the Robbins Building, did you have any negotiations with him? [152]

A. Did I have any with Charley?

Q. Yes.

A. No.

Q. Who carried on the negotiations with Charley Brown for the Robbins Building lease?

A. Well, he came in there to the Executive Committee and asked for the lease—I heard him testify here he talked to Eddie about it first.

Q. Was that the first time you knew Charley Brown was interested in the Robbins Building lease, was when he came into the Executive Committee meeting?

A. No, that wasn't the first time, because he talked about wanting to move over there. That building had been vacant for a long time, and he thought it was a good location for a game, which I guess everybody down there agrees with. And he said he didn't like the spot he had over there and he wanted to make a deal on it.

He spoke to me—I don't know whether it was before he spoke to Eddie Gerety or afterwards, I don't remember that. I remember he just asked me what it could be rented for and so on. I remember he asked me if Robbins owned the building and I said no, that it was built on a ground lease and the lease was up, the building be-

(Testimony of John Harrah)

longed to the Abbot Kinney Company. I told him if he wanted to make a proposition to make it to Eddie. I don't remember whether he said he talked to Eddie or not. That was about it. [153]

Q. Where was he operating before then?

A. That was in the Plaza Building.

Q. Did he have the lease from you or from William Harrah?

A. No, I don't think at that time—I think he had—I think he was paying his rent to the Abbot Kinney Company. That is my recollection. That was another ground lease proposition. And the Abbot Kinney Company got that building back in 1941—1941 or 1942, I don't know. But Charley wasn't paying any rent to William Harrah. He must have been renting it from—

Q. Who owned the equipment?

A. William Harrah in the old location.

Q. And he was paying William Harrah the rental for the equipment, wasn't he?

A. I don't remember whether he was. William Harrah was around here a lot about that time. He isn't any more. He was here—up until a couple of years ago he was here a great deal.

Q. Was that turned over to the Robbins Building after the lease was entered into?

A. Only a portion of it. In fact, I don't think it was part of what was in out there. I think it was some that was stored in the rear of the building, because it was a different form of a game; and Charley had been operating in that old location before he quit there. My recollection is now the Police Commission revoked his permit, and that he made an [154] application for a

(Testimony of John Harrah)

different game over in the new location and he needed some old equipment that William had to use in connection with the new game, part of the equipment.

Q. Do you receive any money from the operations of the Robbins Building? A. No, no.

Q. Does William Harrah receive any money from the operation of that building? A. No.

Q. Or the operation of the game there?

A. No, William Harrah has nothing operating down there at all unless the Abbot Kinney Company can be called an operative property.

Q. Does he receive any money from it? A. No.

Q. Has he ever received any money from the operation of the game in the Robbins Building since Mr. Charley Brown obtained a lease?

A. No, not since nor before. He had nothing to do with Robbins or Charley.

Q. Have you received any money?

A. I have from Robbins as an attorney; I never received any from the operation of anything.

Q. Have you received any from Mr. Brown under—

A. Yes, I received \$2,000 from Mr. Brown.

Q. When was that? [155]

A. That was in September of last year.

Q. Now when was the first time you knew that this contract had been purchased by Charley Brown?

A. Well, I presume it was within a day or so. The first I knew it, Charley Brown told me they purchased the contract, and I presume it was within a very short time that they did it.

Q. Did he tell you who purchased it?

A. He said he and Eddie.

(Testimony of John Harrah)

Q. Did he tell you what they paid for it?

A. Yes, he said they paid \$15,000 for it.

Q. When was the first time he requested that something be paid on account?

A. I think when he came into that meeting just after he purchased it, within a week or so.

Q. Within one week?

A. I think about a week or ten days after they purchased it he came in and—I have no recollection of him saying anything to me about payment until he came in there that day.

Q. Who was present at that meeting?

A. Well, Carleton and I were there. I don't know whether Mr. Gerety was there or not. I heard Mr. Brown testify he was not. But—Mr. Gerety was present at some of the Executive meetings, and some of them he wasn't. I don't think Al. Newton was there, but I know that after they held that—tried to hold the Directors' meeting on May 3rd—that Al. [156] Newton used to come into the Executive Committee meetings sometimes and say that he didn't think there was any Executive Committee and he was only there to see what transpired and that he didn't want to be listed as present or having anything to do with it. But I have no distinct recollection.

Q. What did Mr. Brown say to you at that time?

A. Oh, he said he wanted some money on the thing and started talking about the contract provided for a \$30,000 payment every year, and that there already was a notice to the company that Cruickshank was going to turn the water off.

(Testimony of John Harrah)

Q. Did you know about that notice?

A. Yes, I knew about it.

Q. When was that notice served on the company?

A. I don't know that it was served. I think it came by mail. You might call that a service.

Q. When did it come through the mail to the company?

A. I couldn't tell you that; I don't know.

The Referee: Q. Give us your best recollection.

A. I think it was—

Mr. Kitzmiller: Would you like the exact date? It was the 6th or 7th of June—I believe I have a copy of it.

Mr. Davis: The 6th or 7th of June that the—

Mr. Kitzmiller: June 6, 1944.

Mr. Davis: Q. Did you see a copy of the notice, Mr. Harrah?

A. My recollection is that two of them came to the Abbot [157] Kinney Company in separate envelopes within two or three days of each other, and that—Eddie Gerety called it to my attention and gave me one of them. I don't remember the exact date when it was received. As I remember it, it was about the middle of June; but I might be mistaken. I think it was mailed from New York. That is my recollection; I might be mistaken about that.

Q. Did you see it before or after you had your conference with Mr. Charley Brown regarding the Cruickshank contract?

A. You mean when he asked me my opinion about it?

Q. Yes.

A. It was after that. Long after that.

(Testimony of John Harrah)

Q. It was long after that that you saw that letter?

A. Yes.

Q. Now you heard Mr. Brown testify this morning that after his first conference with Mr. Darling and before he purchased it he talked to you again about the purchasing of the contract. Do you recall where that conversation took place?

Mr. Kitzmiller: I don't recall such a conversation.

The Witness: Only one, as I remember.

Mr. Davis: Q. I think the testimony was this morning—I asked him if he talked to Mr. Harrah after he talked to Mr. Darling—

A. He didn't talk to me but once.

Q. He only talked to you once? [158]

A. Only once before he bought it. When he talked to me, he and Eddie were thinking of buying it.

Q. Did he tell you they were then negotiating with Hugh Darling about it?

A. My recollection is that—I asked him what they were going to pay for it, and he said Eddie thought they could get it for \$15,000. That is all I remember about it. I think I told him then—I know I told him about Lou Halper negotiating for it and that Lou had been authorized to offer \$15,000.

Mr. Cobb: Mr. Davis, are you going to put that letter in? You have shown it to the witness.

Mr. Davis: Yes, in just a minute.

Q. Did you tell him at that time that Cruickshank had declared an intent to turn off the water?

Mr. Kitzmiller: He couldn't have.

The Referee: Let us not argue.

(Testimony of John Harrah)

The Witness: No, I didn't tell him. I didn't know anything about it. When I first saw this letter was the first I had heard about their intention.

Mr. Davis: Q. I call your attention to a letter dated June 6, 1944, F. R. Cruickshank Company, directed to the Abbot Kinney Company, and purportedly signed by H. B. Dorr, and ask you if you have seen this or a copy of this letter? A. Yes.

Q. Where did you see that? [159]

A. I am not reading this; but I have seen one that looks like it. I presume it is the same.

Q. Where did you see that?

A. Mr. Gerety handed it to me in the office of the Abbot Kinney Company.

Q. Do you recall approximately what date that was?

A. About the middle of June.

Q. What did Mr. Gerety say to you at that time?

A. He just said, "Here is a notice from Cruickshank Company."

My recollection is it was received just about the time that Charley Brown told me that he and Eddie had bought the contract.

Q. Did Mr. Gerety tell you at that time that they were negotiating for the contract?

A. No, he never told me they were negotiating for the contract.

(Testimony of John Harrah)

Q. The purchase was made on the 13th of June? Does that refresh your recollection as to when Mr. Gerety gave you that? A. The purchase was made when?

Q. The 13th of June, 1944, as I remember it.

A. Well, my recollection is it was about that time. I don't know whether it was just before or just after.

Q. Mr. Gerety just handed it to you; and didn't he say anything further other than "Here is a letter from Cruickshank [160] Company"?

A. Oh, I think he did say something. I think—I might be mistaken. I have a recollection that he did say something, but I am not so positive about it.

Q. What is it your recollection that he said?

A. My recollection is that he said he called Hugh Darling on the phone as soon as he got this and asked him about it and it meant what it said, that they were not going to stall around about it, or something like that.

Q. Did you call Hugh Darling or make any inquiry as to what they intended to do?

A. I hadn't talked to Hugh Darling or communicated with him in five years, I guess.

Q. Is it not a fact, Mr. Harrah, that you and Mr. Carleton Kinney were in fact running the Abbot Kinney Company at that time?

A. No, we weren't running it.

(Testimony of John Harrah)

Q. You stated, did you not, that Mr. Alfred Newton did not appear at any of these Executive Committee meetings because he felt that—

A. No, I didn't say that. I said that two or three meetings, that's my recollection, after that attempted meeting of the Board of Directors on May 3rd, that Al. came in and said, "I am not here, because there is no Executive Committee," but after that he started functioning and taking his part again. [161]

Q. At that time, then, you made no inquiry, no effort to find out what the contract status was?

A. What the contract status was?

Q. That is right. You made no inquiry of Hugh Darling as to whether the contract could be purchased for the company or anything about it?

A. No, I didn't communicate with Hugh Darling. My recollection is the first I saw of this was after Charley said they had bought it.

Q. You did not see this until after Charley had told you they bought it? A. I don't think I did.

Q. Then when Eddie Gerety handed it to you, what did he say?

A. Well, I don't remember exactly what he said.

The Referee: Mr. Davis, you are offering that?

Mr. Davis: Yes.

The Referee: Bankrupt's Exhibit 7.

(Testimony of John Harrah)

The Witness: Oh, I think he said—I am not at all certain about him saying he called Hugh Darling. I have a recollection—it is very faint—I remember this: He said he received two altogether and asked me if I wanted one. I said, “Yes, give it to me.”

The Referee: Q. Did he say he and Mr. Brown had purchased the contract?

A. He wasn't the one that told me that. [162]

Q. I am asking you if he did. When he handed you this letter did he say, “Mr. Brown and I have purchased this contract” or anything to that effect?

A. I think at the time the letter was received that I knew they had purchased the contract and Eddie said, “Well, this saves us the bother of giving a notice” or something.

I said, “You don't want to give any notice, do you?”

He said, “Well, I want to collect some money one way or another.”

The Referee: We will have to take an adjournment, gentlemen. That document was marked Bankrupt's Exhibit 7.

Mr. Brown: I would like to correct a statement I made.

The Referee: You will have a chance tomorrow morning. Court is adjourned. [163]

Los Angeles, California. Wednesday, July 25, 1945.
10:00 o'clock, A. M. session.

JOHN HARRAH,

recalled for further

Direct Examination

By Mr. Davis:

Q. Mr. Harrah, about that payment of \$7500, before you made the payment of \$7500 to Mr. Brown on the contract, did you contact any of the other members of the Board of Directors as to whether that payment should be made?

A. None other than Carleton Kinney, a member of the Executive Committee, as far as I remember now.

Q. You did not call Lou Halper and ask him if any should be paid? A. No.

Q. Did you call Mr. Davis and ask him if any should be paid? A. No.

Q. You called none of the members of the Board of Directors? A. I did not.

Q. And yet you knew at that time, did you not, that there had been an attempt made to call a meeting of the Board of Directors for the purpose of terminating the authority of the Executive Committee of which you were a member? [164]

A. Well, I don't know what purpose they called the Directors' meeting for. I know they made an attempt to hold a Directors' meeting.

Q. You know one of the attempted actions they took was to attempt to terminate the Executive Committee?

A. I was told afterwards that your brother Tom had so notified Mr. Gerety.

(Testimony of John Harrah)

Q. And that was prior to this payment in June of \$7500, was it not?

A. That was in May, the 3rd of May, I think.

Q. And you received notice of the attempt to terminate the Executive Committee's authority immediately after that meeting was held; isn't that so?

A. I was informed of it, as I told you, that Mr. Gerety said your brother came in the office that evening, I think, just before closing time and said they had held a Directors' meeting and he was fired and—Mr. Gerety he was speaking to—and the Executive Committee was dissolved and Tom Davis was president. And I think he mentioned you were the other officer—I don't remember that. Mr. Gerety told me that.

Q. So that, knowing the temper of the other members of the Board of Directors, you did not call then to see whether they felt it was proper to make any payment on account of this sprinkling system contract?

A. Those three, no, I didn't call any of them.

Q. And you did not call Al. Newton, did you, and ask [165] him if it was all right to make the payment?

A. He was one of the three.

Q. Did you call Helen Kinney Ward back in Oklahoma and ask her if it was all right?

Mr. Cobb: We object to that on the ground that the question has been asked and answered.

The Referee: He says he did not call anybody.

Mr. Davis: All right.

The Referee: Q. Did the corporation have an attorney at that time, Mr. Harrah?

A. They didn't have any regular retained attorneys. If they had business, they gave it to somebody to handle.

(Testimony of John Harrah)

Q. You had no regular attorney?

A. No, no retained attorney.

Q. I see. I think you testified that you saw Bankrupt's Exhibit 7 before the payment of \$7500 was made. Was that your testimony?

A. Before the payment was made.

Q. That is the letter from Cruickshank.

A. Yes, I saw that before the payment of \$7500 was made.

Q. Did you ask for any legal advice on the matters mentioned in Bankrupt's Exhibit 7 before you made—

A. That one you showed me?

Q. No—

A. No, I didn't ask for any legal advice on it.

The Referee: Go ahead. [166]

Mr. Davis: Q. Who was the attorney representing the company at that time on the matters as they came up?

A. Well, I don't remember. There wasn't any rule on it. I think Mr. Pool had represented the company on the important matter of collecting \$20,000 insurance on a building that was burned. That had been a year or so prior to that. I don't remember at that time that there was anything—I remember—I remember I myself answered a complaint on a little damage suit out on the Pony Ride there for the company.

Q. Well, as a matter of fact, Mr. Harrah, Mr. Pool was the only attorney representing the company at that time; isn't that so? A. I don't know.

Q. Other than yourself?

A. I don't remember at present. I might be mistaken, but I don't remember the company employing anybody else other than Mr. Pool for the last couple of years.

(Testimony of John Harrah)

Q. You knew when this petition in bankruptcy was filed?

A. Well, I read it in the newspapers a day or so after.

Q. You read it the next day? A. I presume so.

Q. And immediately thereafter did you hold an Executive Committee meeting for the purpose of determining what action the company was to take in defending that proceeding?

A. I don't know—immediately thereafter? I presume it came up at the next regular meeting. I remember we retained [167] Mr.—I think Hiram Casey and Mr. Pool—to represent the company. I presume it was the next regular meeting. That is the way I remember it now.

Q. That was done on October 24, as I recall; is that correct? Was that done on October 24th?

A. If you have the minutes there, that would be correct. I don't know. I couldn't tell you from memory.

Q. Will you look at this, please?

A. Yes, that is right, October 24, 1944.

Q. You then employed Mr. H. B. Pool and Hiram Casey to represent the Abbot Kinney Company in Bankruptcy proceedings? A. That's right.

The Referee: I beg your pardon, I did not get that date?

Mr. Davis: October 24, 1944.

Q. Now you know that a special meeting of the stockholders of the Abbot Kinney Company was called for November 8th, 1944?

A. Yes, if that's the date.

Q. And your son William Harrah has a—certain stock—did have—under an agreement dated December 23, 1937, with the Abbot Kinney Company as of the

(Testimony of John Harrah)

date of the giving of the notice of the special meeting of the stockholders?

A. Well, I don't know. From a legal standpoint I don't know whether he did or not. Such a contract had been executed.

Q. And under the terms of that contract he would be [168] entitled, I assume, would he not, to notice of the special meeting of the stockholders?

Mr. Kitzmiller: That would call for a conclusion as to whether or not—

The Referee: Sustained.

Mr. Davis: Q. But a notice of that meeting was sent to Mr. William Harrah, was it not?

A. Not as far as I know. I never heard of it if it was.

Q. When did you first learn that the special meeting was to be held?

A. Well, it was just a few days before it was held. I was not a stockholder. No official notice was given to me.

Q. Well, as a matter of fact, Mr. Harrah, a letter was sent to your son William Harrah requesting him to give instructions to the trustees under that agreement as to how they should vote; isn't that so?

A. I don't know. I don't know about that.

Q. Did Mr. William Harrah talk to you regarding it?

A. He talked to me regarding it, yes. But I called him up. I remember that. I have no recollection now of him ever having mentioned receiving any notice.

Q. That meeting was set for November 8, 1944, which I believe was a Wednesday—

A. I think that's right.

(Testimony of John Harrah)

Q. —do you recall that date?

A. I think that's right. I believe it was. [169]

Q. And you held a meeting of the Executive Committee on November 8th?

A. Yes, that's right; Tuesday was our regular meeting day.

Q. And at that time what did you do regarding the sprinkling system contract, if anything?

A. We handed in an agreement with Charley Brown providing that they wouldn't turn the water off for a year if we would pay them \$30,000 and get a credit for \$50,000 on the amount due.

Q. Was that offer made in writing? A. Yes.

Q. I call your attention to Bankrupt's Exhibit 4 and ask you if you have seen that document before?

A. Yes, that is the proposition he submitted there that day.

Q. What did you say to Mr. Brown when he presented that proposition to you?

A. Oh, Carleton Kinney and I talked to him and asked him if they wouldn't take less money than that. And I told him he was pretty lucky to be able to collect any amount of money like that; that the company had had a year like it had never had before since I had had anything to do with it. He said no, they wanted the contract carried out according to the terms but they were willing to make a concession and give \$20,000 additional credit. Otherwise they would turn the [170] water off and then they didn't know what they would do.

Q. Was Mr. Eddie Gerety present at that time?

A. Well, I am not certain whether he was or not.

(Testimony of John Harrah)

Q. He attended most of those Executive Committee meetings, did he not?

A. He was often there but he wasn't always there.

Q. And he was familiar with the financial status of the company?

A. Oh, yes, I presume so. He always knew how much money they had on hand.

Q. Mr. Harrah, you adopted a procedure down there in regard to the carrying of the money in that you would have the receipts deposited in an account and then you would have the money withdrawn and put in the cashier's checks and those cashier's checks turned over to you for supposed safe keeping; is that correct?

A. Well, I had—there was a judgment against the company of about \$15,000, I think, on a person injury case. It was on appeal, and no bond was up. So I didn't let a lot of money get in the bank. We would take that sum out in cashier's checks made to the Abbot Kinney Company.

Q. Why were you particularly concerned about that judgment?

A. Because we didn't want them to attach the whole bank account and put the company out of business as far as being able to operate was concerned. [171]

Q. How much would you carry in your bank account on an average?

A. Well, I couldn't tell you that. I didn't pay any particular attention to it, but I think—oh, anywhere from five to ten thousand dollars, something like that.

Q. You would carry that in the bank account?

A. I think so.

(Testimony of John Harrah)

Mr. Kitzmiller: Wouldn't that all be irrelevant unless we get down to, say, June and November of 1944 as to how much the company carried in bank accounts on an average throughout a period of time?

The Referee: The objection is overruled. Go ahead.

Mr. Davis: Q. Did you carry that average, you say, of between five and ten thousand dollars in the account—

A. I am just making a guess, Mr. Davis, mostly a guess.

Q. Was that after you had taken out these cashier's checks you would still have that account?

A. He always had an account. I couldn't tell you positively how long Mr. Mapes would credit. The book-keeper did that.

Q. You did take those checks, then, and you would have them in your possession or under your control?

A. Yes, I was the treasurer of the company; so I held the checks.

Q. What amount of checks did you hold as of November 7, 1944? [172]

A. I don't remember that; there were quite a number of them.

Q. Close to \$30,000, a little more maybe?

A. I don't know.

Q. How did Mr. Brown learn that you had about \$30,000 available for payment on account of the sprinkling system contract?

Mr. Kitzmiller: Just a moment, I object to that on the ground that it assumes facts not in evidence. There is no evidence to show Mr. Brown learned he had \$30,000.

The Referee: Overruled.

(Testimony of John Harrah)

The Witness: I don't know how I learned, but I could make a good guess.

Q. Well, you made the statement just a moment ago, Mr. Harrah, that you told him he was pretty lucky to be able to collect that amount, because the company hadn't made so much money before. Did you tell him also at that time how much money the company had available?

A. No, I never told him how much money the company had any time.

Q. But you just made that general statement, which led him to believe that there was \$30,000 available?

A. Oh, no. I assumed at that time that he knew that there was \$30,000 available. I don't know he did, but I assumed he did.

Q. Did you assume that because he had made the demand for [173] \$30,000?

A. Yes, I didn't suppose he would make a demand for something the company didn't have.

Q. If he had made a demand for \$50,000, would you have made that same assumption?

A. No, I would have thought if he had he was mistaken, because we didn't have that much money.

Q. But the fact that he made a demand for \$30,000 and that happened to be almost the exact amount the company had, that made you think he had other information?

Mr. Cobb: We object to that on the ground that it assumes facts not in evidence.

The Referee: Overruled.

The Witness: What was the question?

(Testimony of John Harrah)

Mr. Davis: Mr. Reporter, will you please read the question?

(The reporter read the question.)

The Witness: I don't think that was the exact amount the company had. I don't remember now what the company had; but my recollection is it was close to \$40,000. I might be mistaken. I assumed that—if you want to know what I thought, I thought probably Eddie Gerety had told him how much money was on hand. He was with him. He didn't tell me what he knew, but I could have made that guess when I was six years old.

Q. What did you say to him when he stated he wanted [174] \$30,000?

A. Oh, we talked to him. Carleton and I talked there quite a little while with him.

Q. Just what did you say, Mr. Harrah?

A. I couldn't tell you the words I said.

Q. I want just approximately.

A. We discussed with him, as I say. I said, "Well, you and Eddie are pretty lucky to get this thing when the company has got a prosperous a year ahead of it as it has; and you ought to give a little better terms. There hasn't been anything paid on it in a long time except when you got \$7500."

And he said he and Eddie had talked it over and they wanted it put on the basis it was agreed to be put on, which was \$30,000 every twelve months; but he said they would give an additional credit of \$20,000.

Q. Didn't you point out to him that they had already received \$7500 on it the short time they had had it and

(Testimony of John Harrah)

that, under their theory, they were not entitled to \$30,000 for that payment?

A. Yes, we talked about that; and he said well, when the \$7500 was paid they gave an agreement they wouldn't turn the water off for three months, which was at the rate of \$30,000 a year. And the three months was up. In fact he had been in there before that. I remember now he came in—that first payment, I think, was made about the 20th of June, I think. He came in about the 20th of September, right around [175] that, when the three months had expired, and wanted to know what we were going to do about additional payments. So we just talked then, and we didn't do anything, just talked about it. And then he came back on the 7th of November.

Q. You knew then that a special meeting of the stockholders was being held on the 8th of November for the purpose of electing a new Board of Directors. Why didn't you wait on that payment until after it had been determined whether a new Board had been elected?

Mr. Cobb: We object to that on the ground that it is argumentative and calls for a conclusion of the witness.

The Referee: Overruled.

The Witness: I didn't think there would be any meeting of the stockholders for the reason that in that contract you just mentioned it provided 56,000 shares of stock in that contract couldn't be voted at the meeting without the unanimous consent of all parties to that agreement. Without that being voted, there couldn't be a quorum. That had been attempted once before, and at that time several of the parties to the agreement were sup-

(Testimony of John Harrah)

posed to hold a meeting. And I didn't think there would be any meeting of the stockholders.

Mr. Fitzmiller: We have been talking about this contract back and forth. I wonder if counsel has a copy and if it can be introduced in evidence?

The Referee: You may introduce it when you get to your side of the case. Go ahead, please. [176]

Mr. Davis: Q. As a matter of fact, you know that all the parties to that agreement, other than William Harrah, were the ones that were moving, that were asking for, that special stockholders' meeting; isn't that so?

Mr. Kitzmiller: I object to that on the ground that it is not the best evidence. You are talking about an agreement, and the best evidence as to the agreement and who were the parties, irrespective of who was moving to do anything, is the agreement itself.

The Referee: Overruled. The answer may stand. Go ahead.

Mr. Davis: Q. As a matter of fact, Frank Williams and you had hardly been speaking to each other as the result of your activities on the pier; isn't that so?

A. No, that is not so.

The Referee: Q. May I ask that Frank Williams, whose name has been mentioned a number of times, be identified? Who is Frank Williams.

A. He was commonly known as "Rusty" Williams. He was formerly on the police force of the City of Los Angeles, and he was one of the parties to this bond and stock agreement and interested in it.

Q. He was a substantial party and had a substantial interest? A. Yes.

(Testimony of John Harrah)

Mr. Davis: Q. As a matter of fact, held one of the biggest single interests in the bond pool, did he not?

A. He held the biggest single interest in the bonds in the company.

Mr. Cobb: Q. As one of the petitioning creditors and since the filing of the petition he is deceased; isn't that correct?

Mr. Davis: That is correct. He just recently died.

The Referee: Go ahead.

Mr. Davis: Q. Now at the time this demand for the \$30,000 was made, you had attorneys of record representing the Abbot Kinney Company, Harold Pool and Hiram Casey, did you not?

A. Why—

The Referee: You have gone into that.

Mr. Davis: I just want to approach it—

The Referee: He has already testified as to the legal representation.

Mr. Davis: Q. Did you contact your attorneys to determine whether you had the right to make a payment of \$30,000 when the company was also in a bankruptcy proceeding? A. No, I didn't question it.

Q. And you made no inquiry of either Mr. Pool or Mr. Casey?

A. No, I didn't make any inquiry of anybody. I thought I had the right to pay it.

Q. You knew that the petition had been filed at that time? [178]

A. Yes, I knew it had been filed. It had been discussed, and nobody thought it had any merit at all. The petitioners were not even creditors of the corporation.

Mr. Davis: I move that be stricken.

(Testimony of John Harrah)

The Referee: Proceed.

Mr. Davis: Q. So when this question of the payment of the \$30,000 came up, did you contact any of the other directors of the company?

A. No, I didn't contact any directors. We never had any habit of contacting directors on the meetings of the Executive Committee. We went ahead—

Q. Even though it meant the payment of a sum of \$30,000?

A. We had never paid out \$30,000 before that I remember. But when we held Executive Committee meetings, we never called up the directors to see what they thought. The only time I remember any contact between the directors and the Executive Committee was the time I related, when Lou Halper called up and said not to buy that sprinkler contract for \$10,000 when Al. Newton said it could be purchased at that time. Outside of that all the meetings the Executive Committee had I don't remember—

Q. You knew as the result of that statement of Lou Halper's that he was opposed to the payment of anything on account of that contract? A. No, I did not.

Q. So after you had your conference with Mr. Brown, what [179] did you do about payment of the amount requested by him?

A. Well, after we got through discussing it, we voted to accept his proposition.

Q. Now who were present at that time at the Executive Committee meeting?

A. Well, Carleton Kinney and I were there, and Charley Brown was there; and I don't know whether Eddie Gerety was there or not.

(Testimony of John Harrah)

Q. Do you recall any statements made by Eddie Gerety at that time regarding the amount of money available?

A. No, Eddie didn't do any talking to the Executive Committee at all about that contract, any more than to say that he had a third of it. He let Charles do all the talking.

Q. So you knew at the time you paid the \$30,000 that Eddie Gerety held a third interest in the contract?

A. I knew that. At least I was told that by Charley Brown at the time Charley Brown told me they had bought the contract several months before.

Q. Did you make any inquiry of Eddie Gerety as to whether he held it?

A. No, he told me, too, later.

Q. Eddie Gerety told you that before you paid this \$30,000?

A. He told me—the first time I—after Charley Brown told me, perhaps two or three days, four days, something like that. [180]

Q. I call your attention to Bankrupt's Exhibit 5 and ask you if you have ever seen that check before?

A. Yes.

Q. And is that your signature, "John Harrah"?

A. Yes.

Q. You signed that check for \$30,000?

A. Yes, I signed it.

Q. And then what did you do with that check?

A. I left it in the office there.

Q. Did you deliver it to Charles Brown?

A. No, I didn't.

(Testimony of John Harrah)

Q. Do you know who did deliver it to him?

A. I don't know for certain. I presume, according to the custom of the company, the bookkeeper usually did all those things.

The Referee: Where is the office of the company that you keep referring to?

A. Right at the head of the Venice Pier, just as you go onto the pier. It is on the left-hand side.

Q. Is it on the ocean side or on the land side?

A. Ocean side.

Q. On which side of the pier as you go up?

A. The left-hand side.

Q. On the left-hand side? A. Yes.

Q. That is right where the big Ride is, is it not? [181]

A. Just beyond the Ride.

Q. Beyond the Ride?

A. First building beyond, the rear of the building.

Q. Where is the Security-First National Bank at Venice?

A. That's a little over a block away, at the other end of Windward Avenue.

Q. Which is Windward Avenue, the one that runs into the pier?

A. Yes, the one that runs into the pier; and the Security Bank is east of the ocean front, of course. First you come to the Speedway, which is an alley; next you come to what we call the Trolley Way, which they also call Pacific Avenue. And just across from that, on the corner, is the Security Bank.

The Referee: Go ahead.

(Testimony of John Harrah)

Mr. Davis: Q. As I understand it, Al. Newton was not present at that meeting?

A. No, he wasn't there.

Q. And you did not contact Al. Newton to obtain his opinion as to whether that sum or any sum should be paid on the contract? A. No, I didn't ask him.

Q. Now in order to meet the payment of that check of \$30,000, what did you do? A. What did I do?

Q. Yes. [182]

A. I didn't do anything.

Q. You had certain checks in your possession. What did you do with those checks?

A. The cashier's checks?

Q. That is correct.

A. I always delivered those to the bookkeeper whenever he asked for them. So I delivered some to him whenever he wanted—

The Referee: Q. Mr. Harrah, just tell us what you did on this particular occasion. You have already testified that you did not keep—at least in substance you have testified that you did not keep—as much as \$30,000 in the bank account? A. Yes.

Q. You issued this check for \$30,000. What did you do in this particular instance?

A. Perhaps I didn't state it clearly. I don't have any definite recollection; but whenever there was money needed in the bank to meet checks drawn or contemplated beyond what was in there, I gave these cashier's checks back to the bookkeeper.

(Testimony of John Harrah)

Q. Now in this instance the moment you signed that check you knew that there wasn't money in the bank to cover it. What did you do?

A. That is what I did then. I have no distinct recollection of it, but that is where I would get the money.
[183]

Q. Whom did you give it to? A. Mr. Mapes.

Q. What is his name?

A. His name is Mapes, M-a-p-e-s. He did all the banking as far as I know.

Q. Do you know what hour of the day it was that you handed that check to Mr. Brown?

A. I didn't hand it to him. But this meeting—I think the regular hour for holding the meeting was 2 o'clock. And I presume we were there for a half hour or so.

Q. Yes.

A. So I don't know whether he got the check that day or whether he got it the next day or when he got it.

The Referee: I see. Go ahead.

Mr. Davis: Q. But under any circumstances you saw to it that enough property was put into the bank to meet this check for \$30,000? A. Yes, that's right.

Q. How did you hold out any other cashier's checks?

A. I don't remember.

Q. Do you know how much total money the company had left after you paid out this \$30,000?

A. I don't know now; I knew then, but I have forgotten the amount.

(Testimony of John Harrah)

Q. Well, if I should tell you it was around \$2500, would that refresh— [184]

A. Well, it seems to me I have a recollection of about \$7500. But I might be wrong about that. Perhaps it might have been another cashier's check. I am not certain, as I say.

Q. Well, those records will show. That was my impression. I may be in error on it. Now in your minutes of the meeting of November 7th—(addressing counsel) I believe you gentlemen have inspected these; I don't want to introduce these in evidence if I can avoid it, but I will read it—It provides as follows:

“Charles J. Brown submitted a written proposition for the company to pay him \$30,000 on the sprinkler contract, and the proposal was accepted and the president instructed to sign an acceptance for the company on the letter submitted, and the manager was instructed to pay the \$30,000 and to prepare an additional copy of the proposal to attach to these minutes and also one to be signed by Mr. Brown and the Abbot Kinney Company by the president and delivered to Mr. Brown.”

Now is that substantially what took place at that time, Mr. Harrah?

A. As I remember it. You mean is that—you mean were such instructions as that given?

Q. Yes. A. I think so. [185]

Q. And when it refers to the manager, it refers to Eddie Gerety? A. That right.

Q. Now who gave those instructions to Eddie Gerety?

A. Well, we just did that. Carleton Kinney and I did it, that's all. I don't know—if Eddie was there,

(Testimony of John Harrah)

he got the instructions there. If he wasn't, he got them when the minutes were written up. I don't know; he would know.

Q. Were those minutes written up that afternoon?

A. I couldn't tell you that positively.

Q. Were they written up before this check was actually drawn?

A. Well, yes, I would say they were written up—I couldn't say positively, the girl writes all those minutes down there. Probably the minutes were signed the same time the check was signed.

Q. You will note that this check is dated November 8th, 1944. Is that the date on which the check was actually drawn?

A. I don't know, but I presume so.

Q. And was it drawn in the morning or in the afternoon?

A. I don't know. I didn't write the check. Mr.—

Q. When did you sign it?

A. I signed it whenever Mr. Mapes presented it to me. I don't know whether it was the day of the minutes or the day after.

Q. It is dated November 8th. Was it signed before or [186] after the stockholders' meeting which was at 2 o'clock on November 8th?

A. It was signed before that.

Q. So it was signed on the morning of the stockholders' meeting of November 8th; is that your testimony?

A. If it was signed on the 8th, it was signed in the morning. If it was signed on the 7th, it was signed in the afternoon.

(Testimony of John Harrah)

Q. And it was actually delivered to Mr. Brown then, before the stockholders' meeting?

A. I don't know. I didn't give it to him.

The Referee: Pardon me, will you let me see the minutes that you read? I would like to read them, Mr. Davis.

Mr. Davis: Yes.

Q. Did you at that time, at the time of the meeting of the Executive Committee, when Mr. Brown was before you, ask Mr. Brown what he would take to sell that contract and settle it in full?

A. I don't think we discussed it.

Q. No mention was made of it?

A. I wouldn't say there wasn't any mention made of it, but I don't have any distinct recollection of it.

Q. Did you mention or discuss with Mr. Brown the fact that he had only paid \$15,000 for the contract?

A. Oh, yes, we mentioned that.

Q. Who is Eddie Gerety? [187]

A. The gentleman sitting right there.

Q. And who is he in relation to the Abbot Kinney Company?

The Referee: Those things have been stipulated to, Mr. Davis. Let us get along.

Mr. Kitzmiller: All that was stipulated to was that he was an employee.

The Referee: He was general manager; so stipulated.

Mr. Kitzmiller: That is his title.

The Referee: Gentlemen, I went over these pleadings, and you stipulated it was true he was general manager until December 13, 1944. Proceed.

(Testimony of John Harrah)

Mr. Davis: Might I go into the question of how long he was general manager, your Honor? That is the only thing I was getting at.

The Referee: You have stipulated that E. A. Gerety was an employee of Abbot Kinney Company for many years and from 1937 to December 13, 1944, was its general manager.

Mr. Davis: I think, if you recall, the statement was made that he had been there prior thereto; and I would just like to show his position for over a period of many years.

The Referee: Isn't 1937 long enough? What do you have in mind?

Mr. Kitzmiller: We are going into that, his powers and duties as general manager; and if it is along that line, I am telling you when it comes to putting Mr. Gerety on the stand, I will go into his powers and duties to see what this [188] title of general manager meant and whether or not he had any fiduciary relationship with that corporation.

The Referee: Are you going to argue that a general manager of a corporation, who bears that title and is active in the corporation, is not in a fiduciary capacity regardless of what his duties are; that he may acquire a claim against the corporation the same as an absolute stranger? Are you going to argue that?

Mr. Kitzmiller: Certainly. I am going to argue it, and the mere fact that—

The Referee: We will permit you at the time to make an offer of proof and will rule on whether or not it is relevant and competent. Go ahead, please.

(Testimony of John Harrah)

Mr. Davis: Q. Now after this \$30,000 was paid on account, did you have any contract with Mr. Brown regarding the balance due on the contract and the possible purchase of an interest in it by William Harrah?

A. Yes.

Q. When did that conversation take place?

A. Well, that was, oh, probably the 20th of November, right around that.

Q. Where did you meet Mr. Brown?

A. Oh, I don't know. I am liable to run into him anywhere. He is running up and down the pier all the time. I don't remember where I met him.

Q. Who was present? [189]

A. Just Charley and I.

Q. What was said?

A. Well, I told him that I understood that the—they had held a Directors' meeting after the stockholders' meeting was held. I wasn't present there, but I was told they authorized an attorney to sue Bill Harrah on the old Plaza Building lease.

Q. Did you explain to him what that suit was about?

A. Yes, I told him that they were claiming that they hadn't turned the bonds in properly or something like that, and that I didn't think there was any merit in the action at all but you never could tell within a hundred feet how a lawsuit was coming out and I thought it would be a good thing if Bill had an interest in some obligation of the company and it would probably avoid a suit if he just had it. So I asked him what he would take for the half interest he had left in that contract.

(Testimony of John Harrah)

Q. What did Mr. Brown say?

A. He said he would think it over and let me know about it.

Q. Then did you see him again?

A. Yes, I saw him.

Q. Where was that?

A. Well, I don't know where that was either.

Q. I beg your pardon?

A. I don't know where it was; around Venice somewhere. [190]

Q. Who was present?

A. Just Charley and I.

Q. And what was said at that time?

A. He said he would take \$3,000 for a half of what he had left. So I told him I would call Bill up and talk to him about it.

Q. And did you call Bill? A. I did.

Q. And what was the conclusion reached?

A. Bill said, "Go ahead and buy."

Q. Then did you proceed to buy an interest in the contract?

A. Yes, I gave Charley a check for \$3,000 on Bill Harrah's bank account, and he gave me an assignment—

Q. Who signed the check? A. I did.

Q. And on what account was that drawn?

A. The Bamboo Hut, Security-First National Bank of Venice.

Q. Now you stated that you were not present at the special Directors' meeting at which the suit against William Harrah was authorized?

A. No, I wasn't there; that is, they held a Directors' meeting and I heard afterwards that they authorized the

(Testimony of John Harrah)

suit. I wasn't present at that Directors' meeting. Subsequently it came up—oh, I don't know, a month or two later at a [191] meeting where I was present—and they wanted to sue William Harrah; and I voted, "Go ahead and sue him, get it out of your system."

Q. As a matter of fact, all the Directors voted yes except John Harrah, who voted no, isn't that correct?

A. What does that mean?

Q. This was the meeting of December 4th?

A. December 4th?

Q. That is correct, 1944.

A. I don't know about that one. The meeting that I was informed about took place, oh, about—I would say November 12th, within a day or two of that date. That is the one I heard about and the meeting where I—they suggested suing William Harrah and I voted yes was—oh, that was just two or three months ago. I don't know whether it was Lou Halper's office or down at the Kinney office.

Q. Let me get this straight, Mr. Harrah: At that time you referred to, when there was a Directors' meeting—was that before or after you purchased the contract?

A. Before Bill got the interest in it?

Q. Yes. A. That was before.

Q. All right, now, on what date was that.

A. I just stated, as near as I can remember it was about the 12th of November, because it was just long enough after the stockholders' meeting for them to give the notice, the [192] 48-hour notice required. I remember I got a notice of the meeting, but I didn't attend it.

(Testimony of John Harrah)

Q. Have you examined the minutes of the meeting?

A. No, I haven't seen any of the minutes since you have been the secretary.

Q. Well, now, if I should state that, as a matter of fact, the first time that the question of suit against William Harrah by the new Board of Directors was considered was on December 4, 1944, at which meeting you were present, would you say that was the fact?

A. No, that wasn't the way I heard it. The way I heard it it was the meeting you held just a few days after the stockholders' meeting of November 8th.

Q. Now at the stockholders' meeting of December 4, where this matter was considered, the following took place, is this not a fact.

"The question of bonds having been turned in by the officers of directors of the company of their relatives in discharge of rentals debts owed the company at a value much higher than the market value of the bonds and much higher than other debtors were permitted to turn the bonds into the company was then discussed. Upon motion duly made, seconded, and carried the following resolution was adopted:

Resolved that the law firm of Nicholas and Davis be instructed to forthwith institute an action on [193] behalf of the company against Carleton Kinney, William Harrah, and I, Edward Robbins, for balance due on rentals which were improperly settled by acceptance of bonds of the company above the value thereof. Harrah voted no, Halper declined to vote."

(Testimony of John Harrah)

Do you recall that taking place at that time?

A. No, I don't recall it, but I wouldn't deny that it took place. My memory isn't so good that I can remember everything that happened.

Q. Do you also recall that at that time "A lengthy general discussion was then had on the sprinkling system contract and the payment by the retiring officers of the company to Charles Brown of \$30,000 on the date the new Board of Directors was elected. John Harrah, on questioning of Morris Young, refused to give any reason for having made the payment other than that a demand had been made therefor and a threat to turn off the water by Charles Brown. He stated that he had other information but would not discuss it and that if the company wanted to bring a suit to go ahead and do it. The following resolution was then proposed and seconded: Resolved that Nicholas and Davis, and Charles Cradick be authorized and instructed to forthwith bring an action on behalf of the company against Charles Brown and others to have them declared holders of said sprinkling system contract as trustees for the company and to take such other and further [194] steps as are proper to recover for the company the moneys paid to Charles Brown. All of the directors voted yes excepting John Harrah, who voted no. The resolution was declared adopted."

Do you recall that taking place?

A. There was a discussion there. I don't know exactly what took place. Will you read the next minutes?

(Testimony of John Harrah)

Q. (Reading):

"Frank Williams stated that the withdrawal of the \$30,000 had practically depleted the company's funds and had seriously jeopardized its ability to properly function."

A. Does it say anything about the approval of the previous—

Q. Yes (Reading):

"The minutes of the meeting of December 4th were read by the secretary and were approved as read excepting that that portion of the minutes dealing with the employment of Nicholas and Davis to bring an action against William Harrah, I. E. Robbins, and Carleton Kinney was ordered corrected to comply with the typewritten transcript of the resolution. John Harrah voted no on the motion to approve the minutes as corrected."

A. I remember there was something about the—the discussion of the minutes not being correct before. [195]

Q. You remember we had a long—we had a reporter in there at that time or secretary, and we took the discussion between you and Morrie Young, and that—

A. I don't know. I remember there was a reporter there at one meeting. That may have been the one. But I remember at this other meeting when the minutes were read there was something about them that wasn't correct, I felt, and I didn't vote to approve them. I don't remember all that discussion.

Q. But under any circumstances you do recall that you were opposed to bringing any action to recover this \$30,000 or any part of it from Charles Brown?

A. No, I wasn't opposed to bringing any action. But as I remember the discussion, it was that I said after they got the contract I thought they were entitled to the money.

(Testimony of John Harrah)

There wasn't any reason for suing somebody unless they had something to sue them about. Later on—I know at several meetings of the Board of Directors you haven't had your book with you and I don't know whether—but I remember distinctly it came up for discussion at a later meeting, and for some reason you got authority again to sue those parties. And I voted yes. I remember that distinctly. We all voted yes. I said, "Go ahead and sue and get it out of your system."

Q. I think that is about what was said "get it out of your system." Now, Mr. Harrah, after the discussion with Charles Brown, then you prepared—had an assignment [196] prepared from Charles Brown to William Harrah, did you, of an interest in that contract?

A. I think I prepared it. That is my recollection. I heard him testify somebody else did it. My recollection is I did it.

Q. Was that assignment then executed by Charley Brown in your presence?

A. Yes, my recollection is I prepared it and presented it to him and he read it and signed it and I handed him a check for \$3,000. And that was the 25th of November, when that was done.

Q. As I understand it, you purchased that for the purpose of defending against this action that was to be brought for bonds that you had turned in to pay off a debt of your daughter?

A. I didn't turn any bonds in. I didn't purchase the contract. My son purchased it, the interest in it. But he purchased it on my recommendation after I called him up. And that was the action he had in mind when he purchased it—

(Testimony of John Harrah)

Q. And the purpose—

A. To use as an offset in case they wanted to bring suit, just another defense.

Q. I see. Did Charley Brown have access to the safe of William Harrah in Venice?

Mr. Cobb: What time?

Mr. Davis: Q. Oh, from the time—let's say, during the [197] period of 1943 and 1944.

Mr. Kitzmiller: If you are talking about the Bamboo Hut, he seems to have said that he had access to it.

Mr. Davis: I have not questioned Mr. John Harrah about that.

The Referee: Go ahead.

The Witness: Will you state the question, please?

Mr. Davis: Q. Did Mr. Charley Brown have access to the safe which you maintained in your office in Venice during the year 1944?

A. No, I didn't maintain any safe at my office at Venice.

Q. Was there a safe which you and Mr. Brown had joint access to?

A. There was a safe which we both had access to.

Q. Where was that safe located?

A. That safe was in the back of the William Harrah liquor store in Venice.

Q. What moneys did you keep in that safe?

A. I kept in that safe principally receipts of the Bamboo Hut and the liquor store. The Bamboo Hut was a bar, and the liquor store was a retail store adjoining.

(Testimony of John Harrah)

Q. What moneys did Mr. Brown keep in that safe?

A. Didn't keep any money in it.

Q. Now when Mr. Brown wanted to go in there, he would just go in there and take out any moneys he wanted without first getting your consent to it? [198]

A. Well, it could have been done. He had instructions as to what he could do. What he could do was—he could cash checks that he thought were all right, and there are some things down there in that business that are all C. O. D., like Coca-Cola. They collect the money when they deliver it; and the Home Ice Company; they collect the money when they sell beer, they collect the money. And those other soft drink companies, like, oh, Dr. Pepper and some of the others; and glass, all sorts of glassware, the Reliable Glass Company. It is all C. O. D. business. So he was authorized to do those things, to accept those things that had to be paid for in cash; he was authorized to pay for them out of the cafe. First he was authorized to pay them out of the cash register. But later on the liquor store was closed on account of we couldn't get enough liquor to supply the liquor store and the bar both. So the store was closed—the front door was closed for further business, and it was used for storage for the bar. Then he was given access to the safe because there wasn't any receipts to speak of in the cash register. And he was authorized to accept those things and pay for them and put the receipts in the safe and to cash checks.

Q. You had a desk in the same room as the safe was in?

A. Yes, I was manager of the liquor store and the Bamboo Hut for my son. And that was all the office

(Testimony of John Harrah)

there was to it. It was a large room, as large as this perhaps. The safe was in there, and the desk was in there and the rest of it was [199] mostly filled up with cases, full and empty.

Q. How much money was kept in the safe on an average?

A. Oh, not much money; several hundred dollars, enough to cash several checks; five or six or seven or eight hundred dollars, around there.

Q. Was there ever as much as \$5,000 in there?

A. Oh, no.

Q. \$2500? A. No.

Q. Never \$2500? A. No.

Q. Never that much?

A. No, I have no recollection of there ever being that much cash in there.

Q. Were there securities kept in there?

A. No, all there was in there was the little books of account of the Bamboo Hut and the liquor store and a little money. I also had those—those Abbot Kinney Company certificates of deposit were in that safe. They were locked up in a separate little compartment to which I only had a key.

Q. I did not get that last statement?

A. Those certificates of deposit I held as treasurer of the company. They were in there, but they were locked up in a little iron box part to which I only had the key. And that is all there was. Of course when I would cash checks, [200] I would take the money out and leave the checks there.

Q. You had great confidence in Mr. Brown, I take it, from your testimony? A. Yes, he's honest.

(Testimony of John Harrah)

Q. And you felt that you could trust him in every detail so far as business was concerned?

A. I never had any question about Charley Brown's honesty in my life.

Q. Now has Mr. William Harrah received anything on account of his interest in the contract which he purchased?

A. Sprinkler contract?

Q. Yes.

A. No.

Q. To your knowledge had any money been paid on that sprinkling system contract from the date you became connected with the company up to and including the first payment to Charles Brown?

A. No, nothing had been paid on it.

Q. And you knew when the first payment was made that Eddie Gerety was the general manager of the company, did you not?

A. Well, I knew what he was of the company. I have heard discussion on it, about general manager and so forth. I knew what he was, and I knew what his duties were. I had known that for a long time.

Mr. Davis: I believe that is all, your Honor. [201]

The Referee: Q. Mr. Harrah, do you have any financial interest in the Kinney Company either as a stockholder, bondholder, or creditor?

A. No, I do not have.

Q. Have you ever had?

A. No—wait a minute, I have. I think I have five shares of stock.

Q. You have five shares of stock?

A. I paid five cents for it.

Q. I see. A. I got that a few months ago.

(Testimony of John Harrah)

Q. When did you acquire that?

A. Oh, a few months ago. I have carried that in my pocket ever since I had it. I don't remember the exact date I got it.

Q. Whom did you buy it from?

A. Eddie Gerety. One day he was showing it to me, had some certificates for it. And I said, "I will give you a nickel for it." And he handed it to me, and I gave him the nickel.

Q. Outside of that you have never had any financial interest in this company in any way; is that right?

A. That is right, never had.

Q. Are you entitled to any compensation for any services? A. As director?

Q. As director or member of the Executive Committee what [202] were you entitled to?

A. No, we recently voted the directors \$10 per meeting. Until recently there has been no compensation before.

Q. When you were active as a member of the Executive Committee, were you entitled to any compensation, Mr. Harrah?

A. Yes, that's right. I drew— (addressing Mr. Davis) Didn't we get \$25 a month?

Mr. Davis: I don't know, Mr. Harrah.

The Witness: The members of the Executive Committee got \$25 a month.

The Referee: Q. The members of the Executive Committee got \$25 a month? A. That's right.

Q. How often did you meet?

A. We met usually every week.

(Testimony of John Harrah)

Q. Once a week? A. Once a week, on Tuesday.

Q. All right, what did your office first consist of?

A. In the Kinney Company?

Q. Yes.

A. It consisted of Mr. Mapes, the bookkeeper and auditor; and a young lady—oh, I would say she is assistant bookkeeper and cashier; and Mr. Gerety, who was the manager. That was the regular office there.

Q. In other words, three people in the office?

A. Three people in the office. [203]

Q. Did you have a staff of workmen?

A. Oh, yes.

Q. How many people did you put on the payroll in that capacity?

A. Well, I would say an average of twenty.

Q. Twenty? A. About that.

Q. I see. This sprinkling system you talk about here, was that installed on the Venice Pier?

A. Yes, it covers all of the Kinney property west of the ocean front walk, the bath house, California Theater Building, the Plaza Building—the Plaza Building runs from the theater to the pier itself; and it covers a little wagon trail bar that's on the west side of the walk, and it covers every structure from there clear out to the edge of the pier, on both sides of the pier, and a large elevated water tank built right back of the Robbins Building. It didn't cover the building that burned down; that was on the other side.

(Testimony of John Harrah)

Q. I just noticed something here that confuses me. Bankrupt's Exhibit 2, the assignment to Charles J. Brown, reads in part:

"This assignment has been executed on March 4, 1944, but shall not be effective until the 13th day of June, 1944, which is the date of delivery hereof to the Executive Committee, executed in New York, [204] New York, on March 4, 1944, F. R. Cruickshank and Company, by H. S. West, by H. O. Dorr, Secretary."

Now the place where the "13" is written in apparently originally just had an underline, a blank space. The place of the assignment, the two places in the assignment, where the name Charles J. Brown is written, also apparently were originally just blanks with an underline drawn. My recollection of Mr. Brown's testimony was that these negotiations began in June.

Mr. Davis: That is correct.

Mr. Kitzmiller: That is correct.

Mr. Davis: That they began June 10th about, and that it was consummated June 13th, as I recall it.

The Referee: As he was concerned about an action's being taken on leases and so on and wanted to acquire—thought it would be advisable to acquire this—

Mr. Kitzmiller: Mr. Darling, who I understand was going to be subpoenaed by the others, most likely would be able to explain that. Evidently Mr. Davis talks about—or there was a conversation here about—an option in 1943 and various negotiations in 1944—Mr. Halper and so forth and so on. And most likely this was just a blank assignment—

The Referee: I see.

(Testimony of John Harrah)

Mr. Kitzmiller: —in March of 1944.

The Referee: All right.

Mr. Kitzmiller: At least that accounts for those names' [205] being in blank and the dates, where the—

The Referee: Q. Now, Mr. Harrah, you have spoken of Mr. West, who signed this assignment as the president of the Cruickshank Company, familiarly as "Red" West. Where does Red West reside?

A. I have always understood he lived in New York City. I was—he had told me that.

Q. How? A. He told me that.

Q. Does he have a residence in Southern California, do you know?

A. I don't think think so. I never heard of him having any.

Q. You never did?

A. No, I never.

Q. Where is Mr. Darling's office?

A. It is here in Los Angeles; I don't know where.

Q. That is, in Los Angeles?

A. Yes, he's located here.

Q. How frequently did Mr. West come to Southern California?

A. I don't know. I have recollections of never seeing him myself but twice; and that was a number of years ago, several years ago.

Q. He was not here a great deal that you know of?

A. Not that I know of, no.

Q. You spoke of his having gone to the races, I think, [206] and making some proposition to somebody?

A. Yes, to Frank Williams. That was one time he was here apparently. But I hadn't seen him.

(Testimony of John Harrah)

Q. Now calling your attention to Bankrupt's Exhibit 7, which is the letter from the Cruickshank Company from New York, do you recall ever seeing any other communication from the Cruickshank Company which was on the New York letterhead of the company?

A. I don't recall now ever seeing any communication from the Cruickshank Company on any letterhead other than that.

Q. Do you recall ever seeing any written notice or demand from the Cruickshank Company in connection with the sprinkler contract?

A. Not other than that I don't.

Q. That is the only one you remember seeing?

A. The only written thing I remember seeing, as far as I remember.

The Referee: Do you want to cross examine or call Mr. Harrah as your own witness?

Mr. Heap: Mr. Davis, I have that check and bill of sale you asked about yesterday, if you would like to see it.

Mr. Davis: Thank you. I assume for the purposes of the record we will have to introduce these unless—if you want these back, we could read this assignment into the record.

Mr. Heap: You might read it into the record, because I guess it is an original. [207]

Mr. Davis: Q. I call your attention, Mr. Harrah, to a check #6148, Bamboo Hut, signed by John Harrah, made payable to Charles J. Brown for \$3,000, and ask you if you have seen that check before?

A. Yes.

(Testimony of John Harrah)

Q. What does that check represent?

A. This is a check drawn on the Bamboo Hut account to pay Charles Brown for the assignment to John Harrah of a half interest in the—

The Referee: Bankrupt's Exhibit 8.

Mr. Davis: I would like to read into the record, if I may, the assignment—

The Referee: All right.

Mr. Davis: —in lieu of introducing it in evidence. The letterhead reads "John Harrah, Attorney at Law, Phone 63415, 23 Windward Avenue, Venice, California."

"November 25, 1944.

"In consideration of the sum of \$3000.00 receipt of which is hereby acknowledged, the undersigned, Chas. J. Brown, sells, assigns and transfers to Wm. Harrah, a one-third interest and share in the Cruickshank—Abbot Kinney Co., fire sprinkler system contract recorded in book 10877 page 246 of Official Records in the office of the County Recorder of Los Angeles County, and also the Supplemental agreements pertaining thereto, dated Dec. [208] 29th, 1937, and January 14th, 1943, and all rights thereunder including ownership subject to the conditional sale contract, of the Sprinkler system installed. As the result of this assignment, Wm. Harrah is the owner of a one-third interest, E. A. Gerety of a one-third interest, and Chas. J. Brown still retains a one-third interest. There is at the time of this assignment a balance of \$80,000.00 unpaid on the contract, all of which is now due from the Abbot Kinney Company.

(Signed) Charles J. Brown"

(Testimony of John Harrah)

Q. Now, Mr. Harrah, of your own knowledge is that the actual assignment executed?

A. That's it.

Q. That is the assignment by Mr. Brown to William Harrah?

A. That's it.

Mr. Davis: Thank you.

(A short recess.)

The Referee: Do you wish to cross examine Mr. Harrah or call him as your witness?

Mr. Kitzmiller: I will examine Mr. Harrah.

Cross-Examination.

By Mr. Kitzmiller:

Q. Mr. Harrah, at the time of the payment of this \$7500 in June, 1944, were there any large creditors of the Abbot [209] Kinney Company except—

A. The only large creditors are current creditors. They paid all creditors on the 10th of the month.

Mr. Davis: Your Honor, I object to the question on the ground that it is incompetent, irrelevant, and immaterial so far as this particular proceeding is concerned. I think it goes to the question of the precise—that that is not involved in this particular phase of the investigation.

The Referee: How will it help you, counsel?

Mr. Kitzmiller: Merely this, that counsel—and this is merely cross examination—went into the question of the moneys on hand in June and November and the payment of \$30,000 at one time, \$7500 at another time; and I would like to know whether or not there was any outstanding obligation at those particular times other than this matter of the insurance company—not the insurance

(Testimony of John Harrah)

company, this personal injury judgment—that would show that there were no funds with which this \$30,000 could be paid or the \$30,000 was taken from some other legitimate expense and turned over to these people without this money, all of it, being in the company treasury, being really necessary for allocation to other purposes.

The Referee: Objection sustained. Proceed.

Mr. Cobb: Your Honor, on that I think we should make an offer of proof, that there were no other creditors—the \$15,000 that was mentioned as a judgment was later paid by [210] the insurance carrier. And there were no obligations other than current bills and that condition extended down to the payment of the \$30,000 in November.

Mr. Davis: We object to the offer of proof.

The Referee: You owed \$320,000 on the bond issue, did you not?

Mr. Davis: Substantially that and over \$100,000 in taxes.

The Referee: I think the whole thing is immaterial to this hearing. It will be material if we get to the hearing on the involuntary petition. But it is immaterial to the issues here.

Mr. Cobb: So far as the bond issue is concerned we can go into that—

The Referee: You see where we are going to lead to if we go into the question of the solvency or insolvency of this company in this hearing, or the present liabilities of the company. We are just going to extend this into the involuntary petition, and these matters have not been consolidated for hearing. It is entirely immaterial what the financial condition of the company was. It is ma-

(Testimony of John Harrah)

terial, I think, to know the cash resources of the company at the various times that are of importance here; but what the liabilities of the company were, that is immaterial.

Mr. Cobb: I want the record to be clear on my position. My position is this—

The Referee: You may make an offer of proof, Mr. Cobb. [211]

Mr. Cobb: The offer of proof will be that the bond issue which your Honor has mentioned was outlawed by the statute of limitations so far as any liability against the assets of this corporation; that there were no merchandise creditors or creditors other than for current obligations that had an enforceable claim against the assets of the corporation; that the taxes due were real estate taxes against the particular parcels of real property; that the obligation under the sprinkler contract and the obligation to the trustee on the bond indenture constituted the obligations of the company.

The Referee: Is there an objection?

Mr. Davis: Oh, yes, we object to it, your Honor, on the ground that it is incompetent, irrelevant, and immaterial, and has no bearing on the issues presented in this particular proceeding.

The Referee: The objection is sustained.

Mr. Heap: Let the record show the same objection on behalf of William Harrah, your Honor.

Mr. Kitzmiller: The same objection on behalf of Mr. Gerety with an additional offer to the effect that the assets—an offer to prove that the assets of the company were in no event, under any consideration, irrespective of any of the liabilities, equal to or capable of—or equal to the amount of the bond issue outstanding, irrespective

(Testimony of John Harrah)

of any question of interest on the bond issue; also a further offer that, as to these taxes spoken of, we would prove by this witness [212] that these taxes were not taxes on any of the operative property—

The Referee: Make your offer of proof, counsel. If you don't know what it is, don't ask some other attorney. Go ahead. Have you finished?

Mr. Kitzmiller: Yes.

The Referee: Is there any objection?

Mr. Davis: We object on the same grounds.

The Referee: Objection sustained. Is there any objection to the offer of proof on behalf of William Harrah?

Mr. Davis: We make the same objection, your Honor, to all offers of proof, as I said.

Mr. Cobb: I am not clear whether I made any offer from the period of June 23, I believe the date of the \$7500 payment, to the payment of the \$30,000 on November 8th. I want to be sure that those two periods and dates are covered in my offer.

The Referee: Very well. The objection is sustained. Is there any other cross examination?

Mr. Kitzmiller: Yes.

The Referee: Go ahead.

Mr. Kitzmiller: Q. You stated on your direct examination that you knew what Eddie Gerety's duties were when you became a director of the corporation. Will you state just what those duties were at that time?

Mr. Davis: Now, if your Honor please— [213]

The Referee: Let him finish his question.

Mr. Davis: I am sorry.

(Testimony of John Harrah)

Mr. Kitzmiller: Q. (Continuing) —and what, if any, changes there were in those duties as of a period, we will say, from May 1, 1944, to November 8th or 9th, 1944?

Mr. Davis: If your Honor please, I object on the ground that it has already been stipulated to that Eddie Gerety was the general manager; that it is therefore—that it carries with it all the legal implications; and that it is incompetent, irrelevant, and immaterial for that reason.

The Referee: Just a minute. You opened it, counsel. You asked the witness if he knew what the duties were.

Mr. Davis: I withdrew the question and it wasn't ever asked, your Honor. Remember the objection was made and the stipulation was referred to and I continued no further—

Mr. Kitzmiller: If the reporter will go back to 11:29—

The Referee: The objection is overruled.

Mr. Kitzmiller: Mr. Reporter, will you please read the question?

(The reporter read the following question: "You stated on your direct examination that you knew what Eddie Gerety's duties were when you became a director of the corporation. Will you state just what those duties were at that time and what, if any, changes there were in those duties as of a period, we will say, from May 1, 1944, to November 8th or 9th, 1944?") [214]

Mr. Davis: Might we—if we could refer back to that statement, your Honor—

The Referee: Counsel, let us not argue the rulings.

Mr. Davis: I did not mean to.

The Referee: Go ahead.

(Testimony of John Harrah)

The Witness: The question is, what his duties were at that time? Is that it? That is the way I understand it.

The Referee: Specify the time, counsel.

The Witness: His duties were to negotiate leases and to talk to the tenants and see that the rent was collected, and report—at that time the Board of Directors—there wasn't any Executive Committee; at that time it was the Board of Directors—make recommendations, requests; ask authority to execute leases, make any other contracts in reference to the company; pay taxes—that is, to ask for authority to pay taxes. He was authorized to look after the general up-keep of the property and to confer with all municipal, county, and state authorities on matters pertaining to the Abbot Kinney Company on health or safety matters and such as that. Those were his duties at that time.

The Referee: Q. What time do you mean?

A. When I was put on the Board of Directors December 23, 1937.

The Referee: Go ahead, please.

Mr. Kitzmiller: Q. When the Executive Committee was formed, which I understand was some time in 1940, what were [215] Eddie Gerety's duties after the Executive Committee was formed?

A. As far as duties, they continued to be the same except that he reported and conferred with the Executive Committee and requested them instead of the Board of Directors. Of course the Board of Directors, too, when they met; but they met very seldom. The Executive Committee was the one that held the meetings and con-

(Testimony of John Harrah)

ducted the affairs of the corporation and instructed Mr. Gerety what to do.

Q. Did he have any right, after the Executive Committee was formed, to enter into leases for and on behalf of the corporation?

A. No, he never had the right at the time I was on the Board of Directors unless he got that instruction by action of the Board in specific instances—the Board and, later, the Executive Committee.

Q. Did he have any right to enter into any contracts for and on behalf of the corporation without the specific authorization from the Executive Committee?

Mr. Davis: Just a moment. I object on the ground that it is too indefinite as to what he means by “any contracts.”

The Referee: Sustained. Proceed.

Mr. Kitzmiller: I withdraw that.

Q. Well, in effect, Mr. Gerety was an office manager.

Mr. Davis: I object to that on the ground that it is indefinite as to “in effect.”

The Referee: Sustained. [216]

Mr. Kitzmiller: Q. Do you of your own knowledge know whether or not the Articles of Incorporation of the company provide for a general manager of the Abbot Kinney Company?

Mr. Davis: I object to that on the ground that the Articles of Incorporation are the best evidence.

The Referee: Sustained.

Mr. Kitzmiller: Will you produce the Articles of Incorporation, counsel, and also the By-Laws as some hearing here?

(Testimony of John Harrah)

Mr. Davis: I will if I can find them. I can get the By-Laws.

Q. It was incorporated when, Mr. Harrah? You know that. It was back in 1906, was it not?

A. I don't know when. I didn't do it.

The Referee: Counsel, proceed with your cross examination.

Mr. Kitzmiller: Q. Now the year 1944? Was that a prosperous year in connection with the affairs of the Abbott Kinney Company?

A. It was the most prosperous year the company has had for ten or fifteen years at least, perhaps twenty.

The Referee: I think we had better take an adjournment at this time. The witnesses in the court will be instructed to return here at 2 o'clock p. m. without further notice. [217]

2:00 O'Clock, P. M., Session.

The Referee: All right, gentlemen, proceed.

Mr. Davis: With your Honor's permission and the permission of counsel I would like to call Mr. Hugh Darling out of order. Mr. Darling is due in San Francisco tomorrow and is due out of his office—

The Referee: Is there any objection?

(No answer.)

Mr. Davis: I talked to Mr. Cobb, and he indicated there would be no objection.

The Referee: I think we may proceed. Is there any objection to calling Mr. Darling out of order? All right, come forward, please, Mr. Darling.

HUGH DARLING,

called as a witness on behalf of the petitioning creditors, being first duly sworn, testified as follows:

The Referee: All right, be seated, please. Your name, sir?

The Witness: Hugh W. Darling.

The Referee: All right.

Direct Examination.

By Mr. Davis:

Q. What is your business or occupation, Mr. Darling? [218] A. Attorney.

Q. How long have you been practicing law?

A. Ever since 1928.

Q. Are you acquainted with H. S. West, of the F. R. Cruickshank Company? A. Yes.

Q. Do you represent the F. R. Cruickshank Company in any legal matters? A. Yes.

Q. Did you represent them in regard to a sprinkling system contract that was owned by the Abbot Kinney Company? A. Yes.

Q. Did you at any time serve on the Board of Directors of the Abbot Kinney Company?

A. I did.

Q. When did you go on the Board of the Abbot Kinney Company?

A. I would say it was sometime in 1938, and I remained on—perhaps two or three years.

Q. During that time did you attend any of the meetings of the Board? A. Yes.

Q. You attended most of the meetings, did you?

A. At the start. I would say for the first two years.

(Testimony of Hugh Darling)

Q. Now did you ever make a demand upon the Abbot Kinney Company for payment on the F. R. Cruickshank Company contract? [219]

A. Orally or in writing?

Q. Well, will you start out with orally?

A. I would question whether you would call it a formal demand. The subject was discussed on several occasions that I recall. In writing my recollection is that the demands emanated from the F. R. Cruickshank Company's office in New York.

Q. Do you know how many of those were sent out?

A. As I recall, they would send out a statement which was tantamount to a demand as each installment became due. Then there was one time when the Abbot Kinney Company was placed on formal written notice of a default, that under the contract I think it required a 30-day notice to place the contract in a position where action could be taken under it.

Q. Are you referring to a notice that was sent out this last year, November, 1944?

Mr. Kitzmiller: You mean June, 1944, do you not, counsel?

Mr. Davis: Yes. Pardon me, June, 1944.

The Witness: Yes.

Q. Now during the time you were on the Board of Directors that was not sent out? When that was sent out you were not a member of the Board of Directors of Abbot Kinney Company?

A. That is right.

Q. During the time you were a member of the Board of Directors of the Abbot Kinney Company, did you make

(Testimony of Hugh Darling)

demand for payment of moneys on account of the Cruickshank contract? [220]

A. I don't recall that anything I said could be construed as a formal demand; but my recollection is that either during the course of some of the meetings or in informal conversation with other directors or with officers that I posed the question about when some payment would be forthcoming or words to that effect.

Q. And what was stated to you by the directors at that time, at the times you were at the Directors' meetings? A. I don't recall any statement—

Q. Did you ever receive any payment on account as a result of these demands? A. No.

Q. Did you receive any money on account regardless of the demands?

A. On account of the contract?

Q. On account of the contract.

A. Not that I recall, no.

Q. Do you recall the amount due on the contract at the time you first represented the Cruickshank Company?

A. With accrued interest, I think it was around \$157,000. That is my recollection.

Q. And as of what date was that, Mr. Darling?

A. Well, that was at the time a supplemental agreement was executed and which I think was in the latter part of 1938.

Q. I call your attention, Mr. Darling, to a copy of the supplemental agreement dated the 29th day of December, [221] 1937, and ask you if that is the agreement you refer to?

A. Yes, that is the one. I was wrong on that date.

(Testimony of Hugh Darling)

Q. And at that time you agreed to waive the interest, as I recall—

A. That was it.

Q. —and take the amount for the principal balance due. And what was that amount?

A. According to this contract, \$137,000 owed.

Q. And was any money ever paid on that \$137,000 during the time you represented the Cruickshank Company and prior to the actual assignment of it to Charles Brown, et al?

A. Not to my knowledge.

Q. Are you acquainted with M. Philip Davis—

A. Yes.

Q. —that is, myself?

A. Yes.

Q. Did you have a discussion with M. Philip Davis relative to the purchase of this contract in the early part of 1943; January, 1943?

A. The dates are not clear in my mind, but that sounds reasonable. I did have a discussion, and that date seems reasonable.

Q. And who was present at that discussion and what was said?

A. I don't recall any one being present although there may have been. [222]

Q. Other than yourself and M. Philip Davis?

A. That's right.

Q. What was said at that time about the sale of the Cruickshank contract—

A. The what?

Q. To M. Philip Davis?

A. My recollection on that is very hazy. But as nearly as I recall it, the question was raised as to whether or not Red West, as he was called, would be interested in selling the contract; and I think I said he might be or I would check into it and I believe it was at that time that

(Testimony of Hugh Darling)

I followed it through with Mr. West. And then the discussion was revived and I think the figure finally got down to \$10,000 at that time.

Q. You definitely offered it at that time for \$10,000 to M. Philip Davis?

A. I think that was the time—if it was 1943. Mr. West was out here; and he said, "Go ahead and offer it for \$10,000." I made the firm offer of \$10,000. I think it was the next day he called up and said "Put a deadline on it," which I did on the telephone. And I believe it was 12 o'clock noon two or three days subsequent to the date that I talked to you on the telephone that unless the cashier's check were in my office at that time the offer would be withdrawn and it was withdrawn.

Q. Then after that conversation in 1943 did you have a [223] subsequent conversation with Mr. Philip Davis in Washington, D. C.?

A. I had a conversation with you in Washington, D. C.; but I would be reluctant to attempt to fix the date.

Q. It was subsequent to that time, though?

A. Yes.

Q. And do you recall, Mr. Darling, if it was in the early spring of 1944?

A. It may have been; however, before that there was another conversation with you—or perhaps it was your brother, Tom Davis—at which time a different proposal was made. There were two alternate proposals that contemplated the joining of hands of the so-called Davis group and this West contract. I think that intervened between the conversation I had with you in Washington.

(Testimony of Hugh Darling)

Q. Now do you recall where that conversation took place in Washington?

A. I would say at the Statler Hotel in the lobby.

Q. To the best of your recollection would you state what was said at that time regarding the F. R. Cruickshank contract?

A. I think you put the question to me as to whether or not that offer could be revived, referring, I assume, to the previous \$10,000 offer. I said I contemplated seeing Mr. West in New York within the next two or three days and I would discuss it with him and communicate with you when I got [224] back to the office.

Q. Did you have a conference with Mr. West regarding the same? A. Yes.

Q. Subsequent to that date did you have a conference with Mr. Davis in which you conveyed to him the results of this conference with Mr. West?

A. I believe I did.

Q. What did you tell M. Philip Davis at that time-

A. I think, as I recall, I stated that Mr. West was not at all enthusiastic about it; but inasmuch as his interests had been transferred and he did not anticipate spending any time out here, that he would probably be willing to go through with it but that he was not interested in any more talk. I think he used that wording, "I would like to see some money rather than just talk."

Q. Was there any further statement made by Mr. Davis regarding the right of refusal or anything to that effect?

A. Yes, I think you requested first that I disclose to you in the event any one else should approach me for a

(Testimony of Hugh Darling)

negotiation looking towards the purchase or acquisition of the contract. And I don't recall your words, but it was in effect that you would like to have a chance to meet or beat whatever price might be offered. As I recall, I stated that, in so far as I was able, I would advise you before I made a deal and if possible give you a chance to talk. [225]

Q. That was how long before the first conference you had with Mr. Eddie Gerety and Charles Brown?

A. I would say probably five or six months.

Q. Now just before you had your conference with Mr. Brown, did you call Mr. Davis on the telephone regarding—

A. No, I don't recall—as I reframe it in my mind, and I must confess that it is all quite hazy, it was around the first of the year, perhaps in January of 1944, that I saw you at the University Club and made that statement to you, relating what Mr. West had stated to me in New York.

Q. If I should refresh your recollection, Mr. Darling, if I may, that I was in New York on the 30th of May, 1944—that was the only time I was in New York during that—early 1944—would that help set the date any better for you?

The Referee: New York or Washington?

Mr. Davis: In Washington. I am sorry. In Washington, yes.

The Witness: I think that would tend to confuse me. My recollection is that it was around the first of the year of 1944 that I made that statement to you. Whether that followed or preceded our discussion in Washington I am not prepared to say.

(Testimony of Hugh Darling)

Q. As a matter of fact, you and I had many conversations at the University Club regarding it, did we not?

A. That's right.

Q. Now just when did you contact Mr. Davis, if you did, [226] regarding the possible sale of the contract to a third party?

A. Well, now—

Q. Having particular reference to the final sale to Gerety and Brown?

A. Well, as I reconstruct it, some time in March or thereabouts that Mr. Medigovich, who represented a Mr. Phillips came over to my office and we had several conferences; and my recollection—I may be entirely wrong—is that it was that pending deal which prompted me to advise you that after a certain date I would consider myself released from my statement to you that I would advise you of any deal that was pending. That was not consummated. And I know that about that time I was back East again; and it was in June, as I recall—it was shortly after I had returned from the East—I received or there was a call waiting for me from Mr. Halper.

The Referee: I beg your pardon?

A. Mr. Halper, H-a-l-p-e-r. And he opened or invited negotiations. And I told him that West would be interested, but I quoted him a figure of \$50,000. As I recall, he came up to a firm offer of \$12,500, which I rejected. Then he called one time—it was about that time that Mr. Gerety called me; so this was around May or June. And he came in and discussed the subject, and I gave him the figure of \$15,000. And it was after that Mr. Halper called again and asked me if any one else had approached me. I said yes. Who? [227] I said I thought it would not be appropriate for me to disclose

(Testimony of Hugh Darling)

that. He says, "I assume it is Eddie Gerety; and if you lie, it is all right."

I don't know whether I admitted or denied it. But I heard nothing more from him. I do not recall that was the incident when I called you; it may have been. I think I had only one conference with Mr. Gerety in the office. I believe he offered \$10,000 if I am correct. And I told him the price was \$15,000. I think he called up the next day or a day or so after and said he could go to \$12,500. I told him that would not be acceptable because, as a matter of fact, Mr. West wasn't particularly interested anyway and I wasn't either. And it was then, perhaps another day or two or maybe the next day, that he called and said, "All right, \$15,000."

Mr. Davis: Q. Did you have any conference with him and Mr. Charles Brown prior to the actual consummation of the deal?

A. I don't recall whether I did have. I may have, but I do not recall it.

Q. Now, going back to this telephone conversation with M. Philip Davis, if you were meeting with Mr. Davis in Washington was in May, about May 30th or 31st, of 1944, your testimony, as I understand it, is that it was after that conference in Washington that you advised M. Philip Davis that Mr. West would take the \$10,000 and Mr. Davis said, "Now if I don't [228] accept it, will you give me the first right of meeting a subsequent offer?"

Mr. Kitzmiller: Just a moment. I object to that on the ground that it is leading and suggestive. There has been no testimony here that in May—

(Testimony of Hugh Darling)

The Referee: Sustained.

Mr. Davis: Q. State whether or not, Mr. Darling, the telephone conversation you had with M. Philip Davis was after your conference with M. Philip Davis in Washington, D. C., at the Statler Hotel?

A. I couldn't state that, Mr. Davis, with any certainty. This whole program is confused in my mind. It may have been. Now in going back over this, while testifying from the stand, my impression is that that occurred during the forepart of the year 1944 and preceding the negotiations I had with Mr. Medigovich. It may have been subsequent.

Q. Do you recall that W. Thomas Davis was also in Washington, D. C., at that time?

A. I hadn't; but if you say he was—yes, I believe I saw him at the time, yes. I have seen him there on two or three occasions.

Q. All right, now then, Mr. Gerety was the one that approached you so far as purchasing the contract?

A. Well, he—yes, he called me on the phone and then came into the office.

Q. Then you had a conference with Mr. Gerety and Mr. Brown? [229] A. That's right.

Q. And where was that conference?

A. That was in my office.

Q. And about what date was that?

A. As I recall, it was in June some time.

Q. And what was said?

A. I have no recollection of that. We were discussing the contract, and I made it clear that the assignment or whatever arrangement was made would be without any warranty.

(Testimony of Hugh Darling)

Q. And did they have the money with them at that time? A. I believe they did, yes.

Q. And you then prepared the assignment yourself, did you?

A. No, I had an assignment that had been executed in New York with blanks for the name of the assignee and a blank for the effective dates. And I had written authorization to fill those blanks in and receive telegraphic instructions for authorization before I prepared the final form. That's as I recall it.

Q. And the money was then paid to you in what manner? A. Cashier's checks.

Q. Do you remember how many cashier's checks there were?

A. No, I don't. There was more than one.

Q. Do you know who Eddie Gerety is in relation to the Abbot Kinney Company? A. Now, no. [230]

Q. Who was he at the time you were a member of the Board of Directors?

A. As I recall, he wasn't an officer or director. I think he was the manager.

Q. Mr. West lives in New York, does he not?

A. Yes.

Q. And you represented him in this matter entirely?

A. That's right.

If I may, your Honor, I would like to have this record show that I was on the Board of Directors of the Abbot Kinney Company as the nominee of Mr. West under an agreement whereby he had the right to nominate one director if he saw fit.

The Referee: Very well. The record will so show. Go ahead.

(Testimony of Hugh Darling)

Mr. Davis: I think that is all.

The Referee: Do you wish to cross examine, Mr. Cobb?

Mr. Cobb: Yes, your Honor, thank you.

Cross-Examination.

By Mr. Cobb:

Q. What was the proposed deal with Mr. Medigovich?

A. Several were discussed; none was crystallized.

Q. What was the last one that was discussed?

A. Well, there was under discussion an arrangement whereby Mr. Phillips, who was represented by Mr. Medigovich, would acquire a half interest in the contract with control of action [231] that would be taken under it. He was to assume the expense and liability of litigation if that appeared appropriate.

Q. Who is Mr. Phillips?

A. Well, I understood that he operated the dance down on the pier.

Q. Now there was another deal whereby the Davis group wanted to join with Mr. West—

A. Yes.

Q. —and acquire this? A. Yes.

Q. And what was that proposed deal?

A. That was, as I recall, in '43. It was a proposal that the Cruickshank Company would be placed in the so-called pool with the Davis interest in the bond pool. And the proceeds resulting from that combination were to be shared on a basis that was suggested. My recollection is that Mr. West was supposed to get the first \$25,000 that resulted from the combined pool, so to speak; and then the next \$50,000, I think, went to the Davis group.

(Testimony of Hugh Darling)

Then after that Mr. West was to get another \$50,000. There were two or three alternate plans suggested.

Q. Did that plan call for the payment by the corporation of the sprinkling contract?

A. Well, the plan did not cover that subject, but the contract was to remain alive. I assumed it was.

Q. And the \$25,000 that you had in mind to receive for [232] Mr. West would be paid by the corporation?

A. Not necessarily, because it contemplated a consolidation of the Davis interest in the bond pool with the Cruickshank contract.

Q. But the corporation would pay off the bonds and the sprinkler contract, and then you would divide those proceeds between the two groups?

A. I presume eventually or necessarily the money would have come from the corporation.

Q. When you refer to the "Davis group," to whom do you refer?

A. That is M. Philip Davis and his brother Tom Davis, I think, and the father Moses C. Davis, and Al. Newton. This was back in 1938 when the contract was entered into, and they referred to it as the "Davis group" before—

Mr. Davis: Q. As a matter of fact, it was referred to as the "Newton group," was it not?

A. Maybe so.

Mr. Cobb: Q. As a matter of fact, Mr. Davis has always been tied up with the Newton group, has he not?

A. So I understood.

Q. You gave Mr. Davis an option at one time, did you not? A. An option?

(Testimony of Hugh Darling)

Q. Yes, to buy this contract?

A. Not that I recall, certainly not a written option.

Q. Well, in the discussion you had with him in 1943 in [233] reference to \$10,000 did you understand that he personally or the Davis group was to acquire this sprinkler contract?

Mr. Davis: Just a moment, your Honor. I object to that. It is calling for the conclusion of the witness.

Mr. Cobb: This is cross examination.

The Referee: Overruled. Let him answer.

The Witness: Well, I will put it this way: I did not understand the corporation was going to buy. Now Mr. Davis in discussing it with me said—referred to his associates. Now I didn't go behind that.

Mr. Cobb: Q. He left the impression with you that the corporation was not buying it for that figure?

A. That is the impression I had.

Mr. Cobb: That is all.

The Referee: Is there any other cross examination?

Mr. Kitzmiller: I would like to question the witness, your Honor.

Cross-Examination.

By Mr. Kitzmiller:

Q. Mr. Darling, did you ever receive anything in writing for and on behalf of the Cruickshank Company from the Abbot Kinney Company during that period of time that you were director to the effect that the Abbot Kinney Company would pay you moneys on that contract,

(Testimony of Hugh Darling)

or the Cruickshank contract, moneys on that contract as and when they had moneys available? [234]

A. I don't recall that. Do you refer to the supplemental agreement?

Q. Yes.

A. Well, that supplemental agreement was executed in 1937, and that called for specific payments annually.

Q. Do you know whether the Cruickshank Company ever received any letters subsequent to that supplemental agreement stating that moneys were not available and payments could not be made at the time the letters were written? A. I don't recall any.

Q. Now, going to 1944, you stated that a Mr. Halper offered, you say, the sum of \$12,500, I believe was your testimony, for the—

A. I think his first offer was \$10,000 and I told him we would not accept less than \$15,000 and he went up to a firm offer of \$12,500.

Q. Did you at any time during the period of April to June, 1944, offer to the Davis group or any representative of theirs this contract for any sum under \$15,000—that is 1944?

A. Well, I don't—I don't recall that there was an offer under \$15,000.

Q. Do you recall whether or not you told them that they could have it in May or June—particularly in May, 1944, when you had this conversation back in the Statler Hotel in Washington—that they could have the contract for \$10,000? [235]

A. There was no firm offer at that time. I think it was—the statement was that I would discuss with Mr.

(Testimony of Hugh Darling)

West the matter when I saw him in New York. Mr. Davis asked me, as I recall, whether that offer could be revived at \$10,000.

Mr. Kitzmiller: Mr. Davis, have you the original of the agreement referred to by Mr. Darling; that is, the agreement between Harold Robbins and the Davis group in which the figures with regard to paying the Cruickshank contract off—

Mr. Davis: The agreement of December 23, 1937?

Mr. Kitzmiller: That is it.

Mr. Davis: No, I don't.

Mr. Kitzmiller: Well, I have a copy here. I wonder—

Mr. Davis: As far as I can tell, this looks like a copy of it. I have not had a chance to go over it, but it seems to be a copy of it. Yes, I believe that is, Mr. Kitzmiller.

Mr. Kitzmiller: Q. You were speaking, Mr. Darling, about an agreement whereby there were certain payments to be made to the Cruickshank Company and then so much to the Davis group and then so much to the Cruickshank Company if you did join in on this bond pool. I show you an agreement here and ask you if you—

A. Yes, I am familiar with this agreement, and this appears to be a copy of the so-called bond pool agreement.

Q. And was that the agreement that was discussed with you whereby any moneys received from the sale of bonds were to be paid, first, a certain sum to Mr. West and then some to the [236] so-called Williams group and to the Davis group and then a further sum to Mr. West, as you mentioned in your testimony a while ago?

A. That was, as I recall, in 1943. I think it was Mr. Tom Davis who first discussed with me—it may have

(Testimony of Hugh Darling)

been Mr. Phil Davis, however—about consolidating the Cruickshank Company with the Newton interest in this agreement dated December 23, 1937. Under the plan—I think there were two or three proposals submitted, whereby West would receive the first \$25,000 that came out of either the sprinkler contract or the Newton interest on this agreement of December 23, 1937. Then the next money would go to the Newton group, and thereafter as specified to West.

Q. And you were shown this agreement here?

A. I had a copy of that in my files at the time it was executed, because Mr. West is interested in that agreement.

Q. And Mr. West and the Cruickshank Company were, for all purposes here, one and the same? Mr. West had the contract and then it was transferred over to the Cruickshank Company? When we mention the Cruickshank Company, we are speaking of Mr. West, are we not?

A. Yes, at the time this transaction occurred, because he either owned outright or completely controlled F. R. Cruickshank Company.

Mr. Kitzmiller: I would like to offer this, if there is no objection to its not being an original. [237]

The Referee: Whom do you represent, Mr. Kitzmiller ?

Mr. Kitzmiller: Mr. Gerety.

The Referee: Gerety's Exhibit No. 1.

Mr. Kitzmiller: Q. You say your discussions with Mr. Gerety were in June, 1944?

A. That is my recollection.

(Testimony of Hugh Darling)

Q. I show you a letter, being Petitioner's Exhibit 7, dated June 6, 1944, from the F. R. Cruickshank Company, New York, signed by H. V. Dorr, secretary and treasurer, and ask you if you know who H. V. Dorr was?

A. H. V. Dorr was secretary and treasurer of Cruickshank Company.

Q. Do you know whether or not H. V. Dorr was a resident of California or New York?

A. Yes, I do know.

Q. And what was he? A. New York.

Q. And do you know whether or not he was in California on the 6th of June, 1944?

A. I know that he was not.

Q. Do you know whether or not this letter was sent to the Abbot Kinney Company at the instance and request of Mr. Gerety?

A. I know that it was not.

Q. Do you know whether or not it was sent at the instance and request of Mr. Brown? [238]

A. Yes, I know it was not. It was sent at my instance and request.

Q. And not as the result of any conversation that you had with Mr. Brown or Mr. Gerety?

A. No.

Q. In 1944—I am not sure whether Mr. Cobb asked you this question—or from 1943 down to the date of the sale of the contract did any one approach you on behalf of the Abbot Kinney Company to purchase this Cruickshank contract for the Abbot Kinney Company?

A. No, to my knowledge no one ever approached me on behalf of the company so far as I knew.

(Testimony of Hugh Darling)

Q. Do you know whether or not Mr. West still has the right to appoint a director on the Board of Directors? You stated that you were a director pursuant to some agreement whereby he had the right to make such an appointment?

A. My recollection was that that was a provision included in that contract dated December 23, 1937. It may, however, have been by virtue of a supplemental letter; but it was at that time that the agreement was made that he did have the right to nominate a director.

Q. Do you know whether he still has that right or not?

A. I would say that the right—

Mr. Davis: I will object to that.

Mr. Kitzmiller: I withdraw the question. I have no further questions. [239]

The Referee: Is there any other cross-examination?

Mr. Davis: I have some questions, your Honor please.

The Referee: Proceed.

Redirect Examination.

By Mr. Davis:

Q. Mr. Darling, the conference that you had regarding the possible merger of the so-called Newton group and the F. R. Cruickshank Company took place prior to the offer of sale of the contract for \$10,000; is that not a fact?

A. That took place, as I recall, around the middle of 1943. I think that that \$10,000 figure was discussed or offered both prior and subsequent to that.

Q. Well, is it not a fact that at the time the Davis—the Newton—group was discussing the matter with you

(Testimony of Hugh Darling)

of a possible merger the lowest figure you had ever offered up to that time was around \$60,000?

A. No, I don't recall that figure.

Q. Do you recall a conversation had out at your home at which were present W. Thomas Davis and M. Philip Davis in 1942? I think that was the date you refer to, is it not?

A. I think that preceded that time by a fairly substantial period.

Q. But the merger that we were talking about was at all times before you had indicated you would take the small figure of \$10,000 for that contract? [240]

A. It may have been, but my recollection was that it was—the first time that that \$10,000 figure was discussed was in the early part of 1943. I may be wrong again on that. That was my recollection, but that so-called merger did not contemplate the payment of any cash. It was on the if, as, and when basis.

Mr. Davis: I believe that is all.

Mr. Cobb: That is all.

The Referee: Are there any other questions?

(No answer.)

Q. Mr. Darling, the letter which has been called to your attention and which is Bankrupt's Exhibit 7, was that mailed from your office, if you know, or from the New York office of the company?

A. That was mailed from the New York office. I prepared the form and mailed it back to the New York office. And I suggested that—as I recall, at that time there was some—it was preceding that that I sent it back to New York—there was some discussion about the possibility of a sale of property that had come up. And

(Testimony of Hugh Darling)

I sent that back with the suggestion that the letter be transcribed on Cruickshank's letterhead and sent out in order to place the contract in formal default where action could be taken by means of an attachment or otherwise it appeared appropriate, because under the original contract it required, as I recall, a 30-day notice before action could be taken. [241]

Q. You made some reference to a sale of property. I didn't quite get what you said.

A. Well, at the outset of this deal, if that is the right term, back in 1937, it was then expected that the County or the State was going to acquire the beach property.

Q. Yes.

A. And it was expected that the proceeds would be ample to discharge the bonds or release them and still keep the company active.

Q. I see.

A. And that was the foundation for the agreement by Cruickshank Company to forego the interest and ride with the plan.

Q. I see. Now do you know when this letter was actually mailed? It is dated June 6, 1944.

A. I would say it was mailed on the date it bears. I prepared the form. Some minor changes were made in the form I prepared. I sent it back to New York, and it preceded that date.

Q. Do you have any information as to whether it was mailed by regular mail or air mail?

A. No, except I received a copy presumably at the same time, a copy that was mailed at the same time.

(Testimony of Hugh Darling)

Q. Do you have a system of marking your incoming mail as to the time of its arrival?

A. We did not then, no. [242]

Q. In other words, an examination of this copy now would not disclose the date when the copy reached your office?

A. No.

Q. Then—

A. I do know that it has always been the practice of Mr. West and his office to send anything out to the Coast by air mail. I don't believe I ever received a letter that was not sent air mail.

Q. Do you know of your own knowledge, Mr. Darling, why no formal notice of default was ever given under this Cruickshank contract before the letter which is Bankrupt's 7 was sent?

A. Because it was anticipated that payment of the contract would result from a sale of the property. And there appeared to be no reason for taking action—in other words, I thought—I will take the blame for that—that if an action was filed under the Cruickshank contract, involving in round figures \$150,000, that that would result in one of two things, either precipitate bankruptcy or force a foreclosure of the bonds. And this contract, while it was recorded—that is, the Cruickshank Company contract—and as such constituted a lien on the property, it was junior to the bond issue. And the bond issue, with accrued interest, involved of course a great deal of money. So it appeared to me, at least, that any formal action under the contract would have defeated the purpose of it, because it would have forced [243] either bankruptcy or foreclosure of the bonds.

(Testimony of Hugh Darling)

Q. You said that in your conversation with Mr. Brown and Mr. Gerety you pointed out that the assignment was without warranty? A. That's right.

Q. And in this part of your testimony I think you made some reference to litigation. You said of course they took it subject to any litigation or anything that might arise. I am not trying to quote your exact language. Do you recall that—

A. I don't recall any conference about litigation. But I tried to make the danger clear that a sale to Mr. Gerety or to Mr. Brown, whatever the case may be, was just—

Q. "As is"?

A. Yes, "As is" and "Let the buyer beware".

Q. But did you elaborate at all as to any litigation that might arise if they attempted to enforce the contract?

A. No, I don't recall that that was discussed.

Q. Did you—

A. I think I mentioned in connection with my negotiations with Mr. Medigovich that litigation was dis-succed, and that if Phillips took it over he would bear the burden of litigating it, the expense and the burden.

Q. Did you elaborate there as to what you meant by "litigation"?

A. No, because he was the one who said that he thought [244] that action or a threat of action *might productive* of some benefit. So that was the essence of it.

The Referee: All right. Are there any other questions, gentlemen?

Mr. Kitzmiller: Yes, your Honor.

The Referee: Go ahead, Mr. Kitzmiller.

(Testimony of Hugh Darling)

Recross Examination

By Mr. Kitzmiller:

Q. You spoke of your believing that there would be a sale to the County or the State and that that was the reason why you did not press the enforcement of this contract prior to 1944; is that correct?

A. Well, back up. This agreement that was entered into in December, 1937; that is, December 23rd, the so-called bond pool agreement, was bottomed on the understanding expectation that there would be a sale to the State or the County of beach frontage for the purpose of preserving the beach, and that the proceeds would be sufficient to reduce or discharge the bond issue.

Q. And in 1934 about the time, or immediately prior to the time, that you wrote this letter, did you then become convinced that it looked as if there would be no present sale to the State or County of that beach frontage?

A. You are talking about that letter of June 6, 1944?

Q. June 6th, yes. [245]

A. No, on the contrary, it was about that time, or shortly preceding that time that there was some rumor, probably not much more than that, about the County's acquiring some of the beach frontage down there. And it was my suggestion that that letter be addressed to the company in order to place the contract in default so we could file an action and attachment in the event that would be necessary.

Q. And that was the sole purpose behind that letter?

A. That is as I recall it, yes.

(Testimony of Hugh Darling)

Q. Do you know whether or not these letters that left New York to the Abbot Kinney Company, any of these letters, went by registered mail?

A. I have no idea at all.

Q. Do you know whether or not you advised them to send these letters by registered mail?

A. I don't recall it.

Q. Did—that is all.

The Referee: Q. Let me ask you this, Mr. Darling, if you can remember—do you remember which happened first, the receipt by your office of a copy of the letter which is Bankrupt's Exhibit 7 or the assignment to Mr. Brown of the contract?

A. May I have that question?

The Referee: Mr. Reporter, please read the question to the witness.

(The reporter read the question.) [246]

The Witness: Well, my best recollection is that I received the copy before I heard from Mr. Gerety at all. I may be in error. I know this, that I discussed the subject of such a letter with Mr. West in New York and I told him when I got back I would prepare the form and send it to him.

Q. Do you recall whether you mentioned either the letter or the subject matter of the letter either to Mr. Brown or to Mr. Gerety?

A. I don't recall that I did.

Q. Perhaps this may refresh your recollection: Here is a copy of the agreement, of the assignment to Mr.

(Testimony of Hugh Darling)

Brown. You may examine the dates on that and see if that will refresh your recollection as to whether you had received a copy of the letter which is Bankrupt's Exhibit 7 at the time you delivered that agreement of assignment to Mr. Brown.

A. I would say that I had received a copy of it. In any event it is certain in my mind that the form I prepared and mailed back to New York is substantially the same form as this letter, Exhibit 7.

Q. Yes.

A. And that preceded my conference with Mr. Gerety.

The Referee: I see. Now are there any other questions? May Mr. Darling be excused?

Mr. Kitzmiller: Just one question, your Honor.

Q. From the first time you heard from Mr. Gerety in June, 1944, up to the date that the contract was assigned to [247] Mr. Brown, approximately how many days elapsed—if you recall?

A. It was a short period. I would say certainly not to exceed two weeks; and my guess would be perhaps a week.

Q. About a week?

A. Yes, it is possible that he contacted me before I went East. I would be somewhat reluctant to say, but I know when it got down to negotiating, it only consumed a matter of a very few days.

The Referee: Is there anything else, gentlemen?

Mr. Davis: Yes, your Honor.

(Testimony of Hugh Darling)

Redirect Examination

By Mr. Davis:

Q. You refer to when you went East. When were you East at this particular time you are talking about, Mr. Darling?

A. I know I was East in—well, I had made, as I recall, four trips between the first of January and the last of June. I know I was in the East in March.

The Referee: Q. Do you remember Decoration Day, Mr. Darling? A. No, I don't recall that.

The Referee: Very well.

Mr. Davis: Q. Do you recall that you were in the East in May?

A. That's—yes, because, as a matter of fact, I was in [248] Washington on the first day of June. I know that.

Mr. Davis: That is right. Thank you very much.

The Referee: Is there anything else? May Mr. Darling be excused?

Mr. Davis: Yes, he may be excused.

The Referee: Thank you, Mr. Darling.

Mr. Pool: May I interrupt the Court?

The Referee: Yes.

Mr. Pool: I have to be in a Superior Court matter in Long Beach. Do you want to call me out of order? I have a Superior Court matter in Long Beach starting tomorrow—

The Referee: May Mr. Pool be excused?

Mr. Kitzmiller: Yes, your Honor.

The Referee: All right, come forward, Mr. Harrah. Mr. Harrah has been sworn.

JOHN HARRAH,

recalled for further

Cross-Examination

By Mr. Kitzmiller:

Q. Mr. Harrah, do you know whether or not Mr. Gerety could issue obligations for and on behalf of the corporation? A. No, he couldn't.

Mr. Davis: Just a moment, your Honor. I am sorry. I move that the answer be stricken for the purposes of an objection if I may [249]

The Referee: All right, it may go out.

Mr. Davis: I object on the ground that it is indefinite as to "obligations," and that it is incompetent, irrelevant, and immaterial; also that it calls for the conclusion of the witness.

The Referee: It is sustained. Gentlemen, it is always hard to prove things negatively. It would be much better to ask this witness if he knows what authority Mr. Gerety had.

Mr. Kitzmiller: All right, what authority did Mr. Gerety have?

Mr. Davis: Well, I object—

The Referee: Let us try to limit it a little bit. Suppose I ask the witness, with your permission, counsel:

Q. What authority, so far as you know, if any, did Mr. Gerety have to incur obligations on behalf of the corporation?

A. Well, he didn't have any unless you would call leases an obligation. He only had authority to—he occasionally was authorized to sign a lease by action of the Executive Committee.

(Testimony of John Harrah)

Q. Did he have authority to employ anybody?

A. He had authority to employ general workmen down there.

Q. Did he have authority to fix their wages when he employed them? A. No.

Q. I beg your pardon? A. No, he didn't. [250]

Q. In other words, he was authorized to employ at certain stated rates of pay; is that right? Is that what you mean?

A. He didn't have any authority. He would come in with—saying what he wanted to do, and he would get authority to do it. That is the way it was in employing people—except perhaps that—I would say that the—no, he didn't have any authority to do it. I don't know whether he ever did it or not, but he didn't have any authority to do it.

Q. When it was necessary to put somebody on the payroll, what was the procedure?

A. He would talk to the Executive Committee about it.

Q. Did he say, "I want to hire John Jones for so much money"? A. Yes.

Q. Or did he just ask for permission to hire somebody of his selection?

A. No, it was usually—especially if it was the head of a department, it was always submitted who he wanted to hire and what he wanted to pay them.

Q. If it wasn't the head of a department, did he have to tell you whom he was going to hire?

A. No, I don't think—I don't think it was the general practice to tell everybody he was going to hire, like a carpenter or somebody working under a foreman.

(Testimony of John Harrah)

Q. If he wanted to hire a carpenter, all he needed was authority to hire a carpenter, is that right? [251]

A. Well, I don't think that it was done that way. The way it was done he would talk about work to be done and make an estimate of how much it was going to cost and whether we wanted him to do it or not and authorize it. And if we authorized it, why, then the head of the department that it came under, if he didn't have enough men working under him, would go and get them.

Q. All right, did Mr. Gerety have the power to fire anybody, so far as you know?

A. I don't think he did.

Q Did he have authority to make any purchases for the corporation?

A. Yes, he had authority to make—

Mr. Davis: Q. Would you talk so that I can hear, please, Mr. Harrah?

A. He had authority to make ordinary small purchases in the way of carrying on the affairs of the business, supplies—

The Referee: Q. In the usual and ordinary course of business he was authorized to make purchases; is that right?

A. Yes, ordinary, every day things. If something was of considerable amount, then he came to the Executive Committee for authority to do it.

Q. Did he have authority to borrow money for the corporation? A. No.

The Referee: Are there any other questions? [252]

(Testimony of John Harrah)

Mr. Kitzmiller: Q. Did he have any authority to employ counsel to represent the corporation in connection with any of its matters? A. No.

Q. Did he have any authority to compromise or settle litigation on behalf of the corporation?

A. He did not.

Q. Did he have any right to compromise or settle any claims against the corporation? A. He did not.

Q. Could he modify any of the contracts of the corporation without the consent or approval of the Executive Committee?

Mr. Davis: Just a moment. I object to that on the ground that it is too indefinite as to what they mean by "any agreement."

The Referee: Sustained. Proceed. Make your questions as simple as you can.

Mr. Kitzmiller: Q. After any contract had been entered into under the authorization of the Executive Committee, did Mr. Gerety have any right to either alter or modify or rescind such a contract?

A. He did not.

Mr. Davis: Mr. Reporter, may I have the question read, please?

(The reporter read the question.) [253]

Mr. Davis: Q. That is, with or without the consent of—

The Referee: I am sorry, counsel. Don't ask questions. Proceed.

Mr. Kitzmiller: Q. Did he have the right to pledge the credit of the corporation in connection with any of the obligations of the corporation? A. He did not.

(Testimony of John Harrah)

Mr. Kitzmiller: I believe the question was asked by your Honor whether he had the right to borrow money?

The Referee: Right. The answer was no.

Mr. Kitzmiller: Q. Did he have the right to loan any of the money of the corporation?

A. He did not.

Q. Could he mortgage any of the property of the company? A. He could not.

Q. Could he enter into any litigation for the corporation without the authorization of the Executive Committee? A. He could not.

Q. Did he have any control of the funds of the corporation? A. He did not.

Mr. Davis: Just a moment. I object on the ground that it is too indefinite.

The Referee: That is sustained. The answer may go out.

Mr. Kitzmiller: Q. Could he endorse checks?

A. No, I don't think so. I don't know of any authority [254] he had to endorse checks.

The Referee: Q. Who did endorse them?

A. They were endorsed by a company stamp, "for deposit only."

Q. Didn't he have access to the stamp?

A. I would say that he probably did. The stamp was a stamp and was—endorsing the checks payable to the bank where the deposit was held. I presume he had access to the stamp.

The Referee: "Go ahead."

(Testimony of John Harrah)

Mr. Kitzmiller: Q. Do you know who endorsed the checks of the corporation?

A. Well, the only way they were ever endorsed, so far as I know, is to use a rubber stamp which made the checks payable to the bank where—

Q. Who did that?

A. The bookkeeper generally did it.

Q. You spoke of the heads of departments or foremen. By that do you mean the bookkeeper and the electrician, the man who was in charge of the repairs of the pier—I am calling your attention now to 1944. Were those the only heads of departments?

A. Well, let's see, in 1944 there was the bookkeeper—perhaps that is a head of a department. There is the carpenter boss, as I call him, the man that had charge of all the repair work; and there was the electrician, who had charge [255] of the large electrical installations out there—

The Referee: Q. Did he have any janitor force?

A. Yes, they had that, but that was under contract. The contract was made with them.

The Referee: All right.

Mr. Kitzmiller: Q. Can you recall any other head of a department?

A. I don't after the bath house was closed. That has been closed a couple of years. Previously there was a manager of the bath house.

Q. And those bath house people, could Mr. Gerety employ them?

A. No, not without authorization of the Executive Committee.

(Testimony of John Harrah)

Q. Do you know whether or not the company had any credit?

Mr. Davis: I object to that on the ground that it is incompetent, irrelevant, and immaterial, your Honor.

The Referee: Sustained.

Mr. Kitzmiller: In 1944, the time that this—

Mr. Davis: I object on the ground that it is incompetent, irrelevant, and immaterial.

The Referee: Objection sustained.

Mr. Kitzmiller: I believe that is all.

The Referee: Is there any other cross examination?

Mr. Davis: I would—

Mr. Cobb: On that last question, your Honor, I would like [256] to make an offer of proof that at the time that Mr. Davis stated that the company should buy this Cruickshank Company contract the company only had \$2,000 in the bank. It had no credit or means of obtaining any money.

The Referee: That is what the evidence is so far, that they had \$2,000. You don't have to prove your case by cross-examination of your own witness. All right, are there any other questions?

Mr. Davis: Yes.

The Referee: Go ahead.

Redirect Examination.

By Mr. Davis:

Q. Mr. Harrah, is it not a fact that Mr. Gerety, as general manager, had authority to sign leases for one year or less?

A. No, he didn't have any authority to lease at all except as he got the specific authority from the Executive Committee.

(Testimony of John Harrah)

Q. Is it not a fact that on April 10, 1944, he leased the Kraft Ride to Charles Brown without authority from the Executive Committee?

A. No, I don't think so. I never knew him to.

Q. I beg your pardon?

A. I never knew him to do such a thing. I think that in each case where he executed a lease he got authority to do it. [257]

Q. Is it not a fact, Mr. Harrah, that Mr. Gerety was held out by the company as manager of the company with authority to carry on the transactions of the company?

Mr. Cobb: We object on the ground that it is ambiguous, the "transactions of the company"—

Mr. Davis: Q. To carry on the business of the company.

The Referee: Overruled.

The Witness: No, I don't think so. That was not the understanding around the pier at all, that he had authority—

The Referee: Q. Well, Mr. Harrah, if anybody wanted to do business with the Kinney Company, whom would he be referred to?

A. They would be referred to me.

Q. You had a meeting once a week. If somebody called down there this morning and wanted to discuss a matter of business, whom would he be referred to?

A. If they went to the Kinney Company, they would be referred to Mr. Gerety.

(Testimony of John Harrah)

Q. If they went to the office and said, "We want to talk about some business with the Kinney Company," they would be referred first to Mr. Gerety?

A. Right.

Q. And if it was beyond Mr. Gerety's authority or control, they would eventually come to the Executive Committee?

A. If that was the course the person started with.

Mr. Davis: Q. As a matter of fact, the Executive Committee [258] always held Mr. Gerety out as the manager of the company, did it not?

A. He was designated as the manager of the company. Nobody ever said he wasn't, as far as I know.

Q. And every business matter was referred to Mr. Gerety as the manager of the company? A. No.

Q. Is it not a fact that in all of your minutes of the Executive Committee you refer to Mr. Gerety as the manager of the company?

A. I think wherever he is designated in any capacity it's as manager of the company.

Q. And is it not a fact that you never passed any resolution curtailing the right or authority or powers of Mr. Gerety as manager of the company?

A. Well, my impression is there are minutes of the old Directors' meetings; and I don't—I wouldn't know where to tell you to find them. I think there are such things and—but I know the custom, as I have related; and I also know that when the Executive Committee was appointed they were appointed to carry on the business of the company between the meetings of the Board of Directors.

(Testimony of John Harrah)

Q. That is correct, in lieu of the Board of Directors and with the authority of the Board of Directors?

A. No, just what I said.

Q. Do I understand, Mr. Harrah, that you say that the [259] Executive Committee had the duties of carrying on the every-day business of the Abbot Kinney Company?

A. No, I wouldn't say that. I would say just what I did, just what the authorization was—the Executive Committee had the power to carry on the business of the corporation between the meetings of the Board of Directors.

Q. In lieu of the Board of Directors?

A. I didn't say anything about "in lieu" of anything. That is the way it was done, exactly as word for word.

Q. Now is it not a fact that on September 19, 1944, the following took place: (Reading)

"After a discussion was held relative to sending the manager to Chicago in December, 1944, to attend the annual meeting of the National Association of Amusement Parks, Pools, and Beaches, it was approved.

The company to assume the expense of said trip"? Did Mr. Gerety go back there as manager of the Abbot Kinney Company representing the Abbot Kinney Company? A. No, he didn't go at all.

Q. Was he authorized to go back?

A. He was by those minutes at that time.

Q. And he was authorized on the basis of being manager to go back to represent the company?

A. Yes, that's right; it wasn't to represent the company. The company wasn't to be represented—to go back and learn what he could about any amusement de-

(Testimony of John Harrah)

vices, anything that [260] might be interesting and appear to be profitable to install or encourage some one else to install on the Venice Pier. That was the object of sending him back there.

Q. And he was to report back on anything he saw that was interesting and if possible make a deal to bring that stuff out here, was he not?

A. He wasn't to make deals. He was to report back, that's all.

Q. As a matter of fact, if he could have induced people to bring their own equipment back without any expense to the company, he could have done that, could he not? A. He could not.

Q. I see. On your meeting of September 5, 1944 (reading):

"The manager was instructed to investigate additional toilet facilities on the pier and in the Plaza Building."

The Executive Committee did not do that, did it?

Mr. Kitzmiller: We will stipulate that they did not.

The Witness: No.

Mr. Davis: Q. Then the manager was instructed to carry on that particular activity.

The Referee: It is not necessary to go through those matters and find every time he is referred to as manager. There is not any question: he was referred to as manager and sometimes as general manager; no doubt about that. [261]

Mr. Davis: I am going through here to show you just his activities, because he had full and complete charge of all the business activities of the company.

(Testimony of John Harrah)

The Referee: Well, introduce the matters into evidence.

Mr. Davis: I think that will be the thing to do. We will introduce all these into evidence.

The Referee: Somebody is going to have to pay for the record, you know.

Mr. Kitzmiller: Why, there are authorizations there for him to spend \$10 in those minutes.

The Referee: I don't see how you are going to add anything to the record. The record is here. He was called the manager.

Mr. Davis: That is all, your Honor.

The Referee: Are there any other questions?

Mr. Kitzmiller: Yes, your Honor.

Recross Examination

By Mr. Kitzmiller:

Q. After Mr. Gerety was discharged as manager, who was appointed manager? A. Frank Williams.

Q. And have you known Frank Williams over a period of years?

A. I have known him 15 years, I guess.

Q. You said he was a former member of the Police [262] Department of the City of Los Angeles, did you not, Mr. Harrah? A. Yes, he was.

Q. Then he retired, did he not?

A. Yes, he was out on the retired plan, I think.

Q. And during a portion of the time he was retired he operated a little ranch, did he not?

Mr. Davis: If your Honor please—

The Referee: Make your objection.

Mr. Davis: —that is incompetent, irrelevant, and immaterial.

(Testimony of John Harrah)

The Referee: Sustained. Proceed.

Mr. Kitzmiller: Q. Do you know what experience, if any, Mr. Williams had in any managerial capacity before he was appointed to the position of manager of the Abbot Kinney Company?

Mr. Davis: I object on the ground that it is incompetent, irrelevant, and immaterial.

The Referee: Sustained.

Mr. Kitzmiller: Q. Do you know of your own knowledge whether or not an attempt was made to fire Mr. Gerety after that meeting of May 4, 1944, that Mr. Davis spoke of? That was the meeting, I believe, that was held partially out on the pier and partially in the office. A. May 3—

Mr. Davis: Just a moment. I object on the ground that [263] it is incompetent, irrelevant, and immaterial.

The Referee: Overruled.

Q. Tell us what you know.

A. All I know is what Mr. Gerety told me. He told me, I think the next day, that Tom Davis came into the office and said—that same evening—and said they had held a meeting and that he had been fired and the Executive Committee dissolved, and that Tom Davis had been elected president of the corporation. And I think he mentioned you had been elected one of the officers, but I don't recall what he said about that.

Mr. Kitzmiller: That is all.

The Referee: Q. Well, did Mr. Gerety retire from his position then? A. No, he didn't.

(Testimony of John Harrah)

Q. Do you know whether or not Mr. Gerety put in all of his time for the Abbot Kinney Company or did he have other businesses or employments?

A. He had no other employment as far as I know.

Q. Was he a salaried man? A. Yes.

Q. How much salary was he paid?

A. He was paid \$500 a month.

Q. \$500 a month?

A. Yes, the last part of his employment he was. Prior to that he was paid a lesser amount. [264]

Q. And he continued to receive that salary up to the time of his retirement in December, 1944, as far as you know? A. Yes, I think so.

The Referee: Anything else? Step down, please.

(Short recess.)

Mr. Harrah: I would like to be excused if I can, your Honor.

The Referee: Is there any objection? May he be excused permanently? Does anybody want him—

Mr. Davis: I think we had better have him back—

The Referee: When?

(Discussion off the record.)

Mr. Cobb: May it be stipulated it is agreed we may call Mr. Pool out of order, due to the fact that he is going to be out of town for the next couple of days, without prejudice to any rights we may have as the result of calling him out of order?

The Referee: So stipulated?

Mr. Davis: So stipulated.

(Discussion off the record.)

The Referee: All right, come forward, please, Mr. Pool.

HAROLD B. POOL,

called as a witness on behalf of the respondents, being first duly sworn, testified as follows:

The Referee: Be seated, please. State your name, please.

The Witness: Harold B. Pool.

Direct Examination

By Mr. Cobb:

Q. What is your profession, Mr. Pool?

A. Attorney.

Q. How long have you practiced in Los Angeles County?

A. Since 1922 or '3, somewhere in there. I don't know the exact date.

Q. Were you ever an attorney for the Abbot Kinney Company? A. Yes, I was.

Q. In reference to what matters?

A. My first employment by them was about three months after the Merchants Building was destroyed by fire, which, as I recall it, was in the fall of 1943, I think.

Q. Did you handle the settlement of the fire—

A. I did some other work for them besides that. My next employment by them was drafting an amendment to the declaration of trust that was drawn which secured the bond issue. And that was shortly after I settled the insurance claim on the Merchants Building; it was in the spring of 1944. [266]

Q. Why was it necessary to draw an amendment to the declaration of trust in connection with the settlement?

A. The original declaration of trust, as I recall it, provided that in case of fire any proceeds from any insurance collected were to be used to either improve the

(Testimony of Harold B. Pool)

destroyed building or erect a new building. And the corporation wanted to use the funds for the purpose of paying some taxes; that is, that funds from the proceeds of settlement with the insurance company, and put up a new building; and to do that they had to amend. The matter never went through. I did draw the amended declaration, but I didn't get enough signatures.

Q. In connection with drawing the instrument did you have occasion to examine the Cruickshank Company contract known as "the sprinkler contract"?

A. I did. I asked for the contract so that my declaration of trust wouldn't be contrary to any provisions in that contract.

Q. Now did you represent Charles Brown prior to 1944?

A. My first employment with Charles Brown was about January, 1943.

Q. What was the nature of the employment?

A. To commence a test case on the legality of the game being conducted down there, which I carried through the Supreme Court for him—successfully, by the way.

Q. Now do you recall a conversation with Mr. Brown in [267] respect to the sprinkler contract in June, 1944?

A. I had a conversation with him at—I won't say it was in June, May, or July; but I know it was before he purchased the contract.

Q. When did that occur?

A. Oh, he buttonholed me out on the pier one night and got a curbstone opinion from me at that time.

(Testimony of Harold B. Pool)

Q. What was said at that time?

A. I met him out on the pier, and I asked him what he wanted to know. And he asked me if it was a legal contract and I told him I thought it was. As I recall, that is as much of the conversation as we had. He did tell me he was thinking of buying it.

Q. Did you have anything to do with the letter of November 6, 1944, addressed to the Abbot Kinney Company by Mr. Brown? A. Indirectly I did.

Q. Will you state what you had to do with that?

A. Some time, either late in September or early in October—I forget the date; but if you will get the date of the first football game between U.C.L.A. and U.S.C., you will have the exact date, because it was following that game I met Mr. Brown on the pier and again in the same manner I met him before. He came up to me and started discussing the sprinkler contract. And he told me that he had received some money on it and some more was due and wanted to know if I [268] could tell him how to get it. At the time I told him the best way to get money was to ask for it, and if he had any proposition to submit to the company to put it in writing and offer it. He asked what kind. I said, whatever you want.

That is the last I heard of it. Mr. Brown testified I was with him in dictating that letter the night before. But I was not. I have nothing to do with that other than that one conversation on the same day of that football game. If you could get that date, you will have the exact date, because I discussed the football game with him in the same conversation. It was the first game of the season with U.S.C.

(Testimony of Harold B. Pool)

Q. Now you and Mr. Casey were employed by the company to contest the involuntary petition?

A. That's right. I did two other bits of work for the Abbot Kinney Company. I also brought an action of ejectment against a tenant up there named Tuman; and I was associated with Mr. Casey in the first opposition made to these bankruptcy proceedings.

Q. And you prepared the stipulation that is attached to the present order to show cause?

A. No, I didn't prepare it. I attended a course of conferences where it was agreed upon. As I recall, Mr. Hunt prepared the final draft. I didn't prepare it—at least I don't think I did.

Q. Was anything said at that time about postponing any hearings upon the controversy over the \$30,000, the sprinkler [269] contract, until after trial of the merits of whether the company was to be adjudicated or not?

Mr. Davis: Just a moment, your Honor, I object on the ground that it is incompetent, irrelevant, and immaterial; has no bearing upon the issues of this matter; and that it has been decided by your Honor's ruling heretofore and by Mr. Dickson's ruling.

The Referee: Mr. Cobb, there is a written stipulation, is there not?

Mr. Cobb: Yes, Mr. Grainger argued that that was ambiguous.

The Referee: Was this gentleman a party to the stipulation?

Mr. Davis: Yes, your Honor.

The Witness: I was one of the attorneys for one of the parties.

The Referee: Where is the stipulation?

(Testimony of Harold B. Pool)

Mr. Davis: The whole matter has been gone into on the motion—

The Referee: Was there an objection made on the ground that there had been an agreement by the parties?

Mr. Grainger: Yes, it was argued—

Mr. Cobb: I pleaded in my answer that this matter was by stipulation agreed to be postponed until after the question of adjudication; that it was premature to bring it up at that time. And I think that we are entitled to go into that. [270]

The Referee: Let me examine the pleadings, then.

Mr. Grainger: May I say this, if your Honor please: that that was one of the motions argued before Referee Dickson, as to whether this trial should proceed.

The Referee: Let me read the pleadings here. You are referring to what answer, Mr. Cobb? Are you referring to the answer of Charles Brown?

Mr. Cobb: Yes, your Honor. I believe it is in the motion—

The Referee: I don't see it. Will you point it out?

Mr. Cobb: It is paragraph V of the objection.

The Referee: I am asking you about your answer first.

Mr. Cobb: I may be in error as to its being in the answer. It's in the objection.

Mr. Kitzmiller: It is the last matter I believe in the objection.

The Referee: Let us find the answer first.

Mr. Cobb: Apparently it is not in the answer except that, without waiving the objections that we have heretofore filed, we answer the—

(Testimony of Harold B. Pool)

The Referee: Then it is not a part of your defense on the merits. All right, just refer briefly to your objection, paragraph V (reading):

"That the parties have stipulated and this Court has approved said stipulation whereby the controversy between this objecting respondent will be postponed [271] until the question of whether the above involuntary proceedings will be dismissed or an adjudication entered, all as provided in the stipulation on file here."

Mr. Cobb: That stipulation provides that (reading):

"The pending motion by the alleged bankrupt to dismiss the said involuntary petition shall be reset for hearing upon the Court's calendar at the earliest possible date in February, 1945, but not later than February 16, 1945, and thereafter proceedings to determine the sufficiency of the said involuntary petition, or amendments thereto, shall be prosecuted with due diligence, and all other matters pertaining to the determination of the solvency or insolvency of the alleged bankrupt, and the commission by it of an act, or acts, of bankruptcy, shall likewise be prosecuted with due diligence. Nothing herein contained shall be deemed to prevent the alleged bankrupt from commencing herein proceedings under Chapter X or XI of the Bankruptcy Act."

The Referee: You did not raise it in your answer, Mr. Cobb; and it is part of your objections to the jurisdiction which were ruled upon by Referee Dickson and which rulings we have adopted. And the objection to the pending question is sustained. [272]

(Testimony of Harold B. Pool)

Mr. Cobb: Q. Now do you know what occurred at the time you were substituted or removed as attorney for the alleged bankrupt?

Mr. Davis: Just a moment. I object to that on the ground that it is indefinite. I don't know what he refers to when he says "do you know what occurred." I think we should know what he is referring to.

The Referee: Sustained.

Mr. Cobb: Q. What occurred at the time you were substituted out of the case, Mr. Pool?

Mr. Davis: Just a moment. I object on the ground that it is indefinite.

Mr. Cobb: That is what I am trying to make it. You would object to its being leading if I told him what—

The Referee: Mr. Cobb, to what portion of the pleadings are you now referring, what allegation of the petition or of the answer?

Mr. Cobb: It is offered on the ground of our objection and our defense that we have urged from the beginning, that the alleged bankrupt here is not a proper party to institute this petition before this Court and this Court is not the proper tribunal to try the controversy.

The Referee: The objection is sustained. Proceed.

Mr. Cobb: That is all.

The Referee: Any questions?

Mr. Davis: Just a moment—no questions. [273]

The Referee: All right, step down. Mr. Pool may be excused, gentlemen?

Mr. Cobb: Yes, your Honor.

Mr. Davis: Yes.

The Referee: All right, call your next witness.

Mr. Davis: We are calling Mr. Gerety as an adverse party, your Honor.

The Referee: All right, come forward, please, Mr. Gerety. Raise your hand and be sworn.

EDWARD A. GERETY,

called as an adverse witness on behalf of the petitioning creditors, having been duly sworn, testified as follows:

The Referee: Be seated, please. What is your name, please?

A. Edward A. Gerety.

The Referee: All right, go ahead, gentlemen.

Direct Examination

By Mr. Davis:

Q. Where do you reside, Mr. Gerety?

A. In Venice, California.

Q. How long have you resided in Venice?

A. Since about 1908.

Q. And were you ever employed by the Abbot Kinney Company? A. I was. [274]

Q. When were you first employed by the Abbot Kinney Company? A. In 1926.

Q. And by whom were you employed at that time?

A. By, I think—Thornton Kinney was the president then.

Q. In what capacity were you employed at that time?

A. As manager.

(Testimony of Edward A. Gerety)

Q. And what did you do as manager?

A. I had charge of the office and looked after the workmen and—well, listen, when are you talking about now, 1926?

Q. That is right.

A. And reported the Board of Directors.

Q. Did you carry on negotiations for leases?

A. Yes, which all have to be approved by the Board.

Q. Did you ever appear before any commissions on behalf of the Abbot Kinney Company; for example, the Board of Supervisors, regarding taxes?

A. Yes, I have appeared since then, not in 1926.

Q. How long were you manager that first time?

A. Up until 1933, until they went in receivership and I was appointed receiver.

Q. During the period from 1926 to 1933 you were general manager of the Abbot Kinney Company?

A. I wasn't the general manager. I was the manager of the Abbot Kinney Company. That's a long time ago and— [275]

Q. You purchased the necessary, every day materials, did you? A. That's correct.

Q. And you hired and fired the employees?

A. No, I didn't hire and fire the employees. I had to appear before a Board before I could hire or fire anybody.

Q. That was before the Board of Directors?

A. Directors, I should say.

Q. How many people did you have in the office there during that period of time?

A. At that time I think we had two.

Q. And what did they consist of?

A. Bookkeeper and—

(Testimony of Edward A. Gerety)

Mr. Cobb: We object on the ground that this is too remote.

The Referee: Mr. Davis, let us get down to the present day.

Mr. Davis: Q. You were appointed as the court receiver? A. Yes.

Q. How long did you serve as receiver?

A. Until in the fall of 1937, I think it was.

Q. Then the receivership proceedings were dismissed at that time?

A. No, as I remember, they went into the 77-B; and I was appointed as a trustee.

Q. You were appointed as trustee under the 77-B proceedings? [276] A. I think that was it.

Q. How long did that proceeding last?

A. Not very long; maybe—oh, four or five months maybe.

Q. Then what happened as far as you were concerned?

A. As far as I was concerned, why, in 1937, I think it was, the company went back as the Abbot Kinney Company; that is, the Abbot Kinney Company went back to the Board of Directors.

Q. And you were employed as manager then?

A. Yes.

The Referee: Q. When was that?

A. I think that was in 1937. That was the same year that that contract was made, that pooling agreement.

The Referee: I see. All right.

Mr. Davis: Q. And you continued that employment until what date?

A. Well, it was in—last fall; I think it was November 15th—

(Testimony of Edward A. Gerety)

Q. Of 1944? A. Yes—or November 30th.

Q. What salary did you receive as manager?

A. I was receiving \$500 a month.

Q. What was the next highest salary to you, and to whom was it paid?

A. I think that was \$300 a month.

Q. And who was that paid to? [277]

A. The bookkeeper.

Q. Mr. Mapes? A. That's right.

Q. And how long has Mr. Mapes been with you?

A. I would say about four years, maybe longer than that; 1939.

Q. Who employed Mr. Mapes?

A. Mr. Mapes, when Berry died,—he was a friend of the other bookkeeper—he came down and talked to me about the position. At that time—I think it was in '40, I either took it before the Board of Directors or before the Executive Committee, if there was one, because I couldn't hire a bookkeeper without the Board knowing.

Q. And you interviewed Mr. Mapes and recommended him to the Board, did you?

A. Interviewed Mr. Mapes; and, as I recollect, brought him before the Board.

Q. And the Board authorized you to make the employment then?

A. Either that or they employed him themselves or had me do it, yes.

(Testimony of Edward A. Gerety)

Q. After you started your new employment in 1937 you attended the meetings of the Board of Directors, did you?

A. Some of them. When they wanted me there, they would request me there and I would have to be there.

Q. As a matter of fact, you attended practically all of [278] the meetings of the Board of Directors, did you not, Mr. Gerety?

A. Sometimes they had Directors' meetings in Los Angeles that I didn't know anything about.

Q. Whenever they had them down at the Kinney Company, you were always present?

A. I wouldn't say always; I was usually present.

Q. And you had full access to all the books of the Abbot Kinney Company, did you?

A. You mean the books of record?

Q. Books of record.

A. Yes, the books of record but not your By-Laws or your Articles of Incorporation or your minutes. Sometimes the minutes were there, and sometimes they had them uptown at your office.

Q. But you had under control and direction the keeping of the books and the possession of them, did you not?

A. Yes, the bookkeeper had them. Of course I didn't—

Q. And the bookkeeper was under your jurisdiction, was he? A. Yes, he would be.

Q. Who else did you have in the office?

A. Well, we usually had a girl there.

(Testimony of Edward A. Gerety)

Q. During all of the time?

A. Of this time, yes. Different ones at different times.

Q. Yes. Now who employs the girls? [279]

A. I think Mapes employed this girl, talked to her and talked to me about it. And then I told him to go ahead and employ her.

Q. You told him to go ahead and employ her. And how long ago was that?

A. Oh, gee, I don't know; she must have been there, I think right, after Mapes came.

Q. And do you recall who the girl was before that?

A. No, I don't.

Q. How many girls would you say you had had there during that period of time, since 1937, the time you went with the company?

A. I would say about—maybe three or four.

Q. And those girls were employed by Mr. Mapes or by yourself; is that correct?

A. Well, if we had the Executive Committee, then I took it up with the Executive Committee before I hired them. As far as—I couldn't hire anybody direct.

Q. But you did, before the Executive Committee was organized, employ the girls, did you?

A. Those matters are usually brought up before the Board of Directors.

Q. Now how about entering into leases? Did you have authority to enter into yearly leases—

A. No, I didn't have.

(Testimony of Edward A. Gerety)

Q. —without the authority of the Board of Directors? [280]

A. No, I didn't. Those leases were usually all discussed at the Board—what are you talking about, the Board or the—there are two periods there.

Q. Let us take the period when the Board of Directors met rather often.

A. When the Board of Directors met, I don't think I ever did. In fact, I know I didn't.

Q. After the Board of Directors, did you proceed to sign leases on behalf of the company?

A. I signed leases when I was told to by the Board of Directors, was all.

Q. When the Board of Directors did not meet, Mr. Gerety, did you sign leases? A. I don't think so.

Q. Did you sign a lease?

A. When was the Executive Committee formed, Mr. Davis, so that I could get this better in my mind?

Q. Well, you tell me, Mr. Gerety. I think you were there. We have set it some place around 1940, January, 1940. But I can get the exact date from—

A. You are talking about 1940 on? Is that the idea?

Q. Let us say from 1940 on.

A. That is when the Executive Committee was formed?

Q. Yes. From that time on did you ever enter into a lease on behalf of the company?

A. Not without authorization. [281]

Q. Did you enter into the Kraft Ride lease with Charles Brown under date of April 10, 1944, for one

(Testimony of Edward A. Gerety)

year without having specific authority from the Executive Committee?

A. I did have authority on that lease; if you will look at the minutes there, some time before that, I think you will see that—

Q. As a matter of fact, Mr. Gerety, many tenants came in and out during a season that you would put in possession without having the matter even discussed with the Executive Committee; isn't that correct?

A. There was very possibly somebody over a week-end or a week or something like that, but never any tenancy, never any tenancy.

Q. But you would bring somebody in for a week-end or a week and give them a booth; is that correct?

A. No, because we didn't want them by the week, and we didn't let them come in.

Q. You just got through stating that whenever you did bring them in over the week-end or for a week—

A. If they did come in, I would have to get authorization from the Board.

Q. As a matter of fact, Mr. Gerety, you let in many tenants without having specific authority from the Executive Committee; isn't that a fact?

A. Not to my recollection.

Q. And you purchased materials on behalf of the company, [282] did you not?

A. I did for the regular—the regular work. Of course anything they were conditioning—

Q. You were doing some repair work all the time?

A. We were doing some repair work all the time.

Q. That was part of your operations there?

A. That's correct.

(Testimony of Edward A. Gerety)

Q. So you had to have materials all the time to carry on that work? A. That's correct.

Q. And whenever you needed any materials for repairing the pier, you would order it through the ordinary business channels? A. That's correct.

Q. And you would employ the workmen, would you, on the pier?

A. No, the foreman would employ the workmen.

Q. When you refer to the foreman—who was your last foreman?

A. The last foreman we had was Fred Sandiford. He was the carpenter on the pier.

Q. Was that the last one that was—

A. He was there when I left.

Q. How long had he been with you?

A. Oh, I think he had been—maybe two years, two years and a half. [283]

Q. I see. And with whom did he discuss his employment, with you?

A. Yes, I knew him—

Q. How long had you known him?

A. He was looking for a job, and I knew him as a construction man.

Q. Did you know something about his background?

A. Yes, I knew about his background.

Q. You thought he was a good man?

A. I did.

Q. And then you went ahead and employed him?

A. No, I am pretty sure I took it up with the Committee.

(Testimony of Edward A. Gerety)

Q. Did you fix the amount of compensation he was to receive?

A. No, he told me what he wanted and that was the amount that we agreed on. Help was so hard to get at that time that we didn't have any choice as to what we would pay anybody.

Q. Did he have some workers there?

A. Yes, he had—oh, all the way from three to five or six in his crew.

Q. Did he interview the workers that would work for him, or—

A. Well, he didn't interview them. He knew them or else he wouldn't hire them. If they were good workers, it was all right.

Q. He had authority to hire them, did he? [284]

A. No, he usually came to me; and in the meantime—

Q. And you would approve it?

A. Of course he knew pretty nearly everybody that was down there.

Q. Before he would hire them, he would come and ask you if it was all right?

A. No, sometimes he would go ahead—if he needed a man, he would have to hire them right then.

Q. Then would he come and tell you he had hired them?

A. When I would go on the job, I would usually see them.

Q. What did you say to him about it?

A. He would say, "I had to hire somebody. It was a little too hard for the three men I had," or "Somebody didn't show up."

(Testimony of Edward A. Gerety)

Q. What did you say?

A. Didn't say anything.

Q. You would say that was all right?

A. I didn't say whether it was all right or not, because he had to have somebody and he was the foreman on the job.

Q. Now what other department did you have down there?

A. Well, we had an electrical department.

Q. That was under the management of whom?

A. Mr. Wires.

Q. You—

A. Who was there when I came.

Q. How long did he stay with you? [285]

A. Oh, he was there until just about a year before I left.

Q. Then whom did you employ?

A. A Mr. Strickland.

Q. What is that? How do you spell it?

A. L-e-o, Leo, S-t-r-i-c-k-l-a-n-d. He is there now. He was employed the same way.

Q. And Mr. Strickland was responsible to you after he was employed, then, was he?

Mr. Cobb: I object to that on the ground it calls for a conclusion of the witness and has no bearing on the issues of this case—about hiring an electrician and what he does and who he reports to.

The Referee: Overruled.

Mr. Davis: Q. Now if you were dissatisfied with the work that Mr. Strickland was doing would you have discharged him?

(Testimony of Edward A. Gerety)

Mr. Cobb: We object on the ground that it assumes a hypothetical set of facts.

The Referee: Sustained.

Mr. Davis: Q. How many employees did Mr. Strickland have? A. He had one.

Q. He had one? A. That's right.

Q. And who employed him?

A. Mr. Strickland came to me and said that the work was [286] too heavy and he had to have another man.

Q. What did you say to Mr. Strickland?

A. Oh, he said he had a good man; so we hired him.

Q. What compensation was fixed, Mr. Gerety, do you recall?

A. I think it was around \$6 a day.

Q. Now whenever anybody wanted a lease with the Abbot Kinney Company, whom would they come in to see?

A. If they came into the office they would see me.

Q. And would you sit down and discuss with them the availability of space?

A. That's correct.

Q. And discuss with them the possible terms of a lease? A. That's right.

Q. And then would you authorize the drawing of a lease along the lines which you had negotiated?

A. No, I never authorized them before I took them up at the meeting.

Q. After you made all the negotiations, you would present it to the Executive Committee?

A. That's correct. If they approved of it or if they had any suggestions or changes or if they approved of it—sometimes they did not approve of it, didn't like the type

(Testimony of Edward A. Gerety)

of amusement—then of course they wouldn't approve of it and of course there wouldn't be any deal.

Q. But if they approved of it, they would instruct you [287] to go ahead and finish consummating the—

A. Yes, we had a form lease to make up, and all you had to do was write down the terms and the girl could type the lease up.

Q. Now were you in charge of the collections of the money on the pier?

A. Yes, I had to see that the rentals came in.

Q. In other words, it was your responsibility, Mr. Gerety, to see that the moneys were collected when they were due?

A. That's right. If I didn't, the Executive Committee would ask me why they weren't in.

Q. And it was your responsibility to go out and see that the tenants performed the terms of their leases?

A. Yes.

Q. And you generally handled any repairs that were required on the lease, on the property?

A. Just what do you mean by that?

Q. Any repairs that were made you would decide—

A. No, we never made any repairs for any of the tenants. The only thing we kept up was the piling and the decking.

Q. And that was the part that you were in charge of, then?

A. That was it.

Q. Now were you manager of the company in June, 1944?

A. I was. [288]

(Testimony of Edward A. Gerety)

Q. And you were acting in the same capacity as you had acted since—

A. Let's see—June, 1944? That was after Tom Davis informed me that I wasn't manager any more and that he was president. That was on May 3, as I understand.

Q. But you continued acting as—

A. As long as the Executive Committee was there, I was—I was in general—

Q. And you continued to draw your salary?

A. That's right.

Q. And you drew a salary up until November?

A. That's correct.

Q. Now were you present at any meetings of the Board of Directors at which the F. R. Cruickshank Company was discussed?

A. Board of Directors meetings, you mean?

Q. Yes, at any time when the F. R. Cruickshank Company contract was discussed.

A. Don't get me mixed up now. Keep the dates—

Q. I will try not to get you mixed up. You just tell me if you ever attended a Board of Directors meeting where the F. R. Cruickshank Company contract was discussed?

Mr. Kitzmiller: I object to that on the ground that it is vague and indefinite.

The Referee: It is overruled—whether he ever attended a meeting. [289]

Go ahead and answer the question, Mr. Gerety, please.

The Witness: I said I attended a meeting.

The Referee: If you don't remember it, say so.

The Witness: I don't remember.

The Referee: All right.

(Testimony of Edward A. Gerety)

Mr. Davis: Q. The F. R. Cruickshank Company contract was in your possession as manager of the Abbot Kinney Company, was it not, Mr. Gerety?

A. It was in the safe, yes.

Q. As a matter of fact, you and the office force were the only ones that had access to that safe; isn't that correct?

A. I never had access to it. I never had the combination of it.

Q. When you wanted it you would have to ask Mr. Mapes for it, would you?

A. I would, because I never had the combination.

Q. That was just because you never wanted it, was it not?

Mr. Heap: I will object to that. Mr. Mapes was bonded and responsible for it. Naturally Mr. Gerety didn't want—

The Referee: Proceed.

Mr. Davis: Q. But that Cruickshank Company contract was right there in the office; whenever you wanted it, all you had to do was ask Mr. Mapes to give it to you?

A. That is right, but you usually had it up in your office. [290]

Q. As a matter of fact, Mr. Gerety, I never had it in my office.

The Referee: Gentlemen, you will have to curtail this conversation. We are not going to stay with this case forever. Get down to some business, Mr. Davis.

Mr. Davis: Yes.

(Testimony of Edward A. Gerety)

Q. Now when did you first start negotiations for the purchase of the Cruickshank Company contract?

A. Oh, along about the first of June, 1944, right after the first—not very long before we bought it, a week or ten days before.

Q. Whom did you contact?

A. You mean on the purchase—

Q. About the purchase.

A. Mr. Darling.

Q. How did you first contact Mr. Darling?

A. I think I called Mr. Darling on the phone and made an appointment.

Q. And had you prior to that time discussed the possibility of purchasing it with any one?

A. Yes.

Q. With whom had you discussed it?

A. Mr. Brown.

Q. Had you discussed the matter of purchasing the contract with any one else?

A. Nobody else. [291]

Q. Had you discussed it with John Harrah prior to that time? A. I had not.

Q. What did Mr. Brown say to you when you first mentioned it to him?

A. I met Mr. Brown on the pier one day after we had had a—couple of sprinkler heads had broken off. And I was talking about the sprinkling system. And in the meantime I had been informed that I was out. So I suggested that we would think it over with the idea of buying it. So we talked maybe two or three times. So finally he said he thought it would be a good idea to. And, as I am stock-

(Testimony of Edward A. Gerety)

holder and bondholder, I figured just the same as you, to take care of myself.

Mr. Davis: I move that latter portion be stricken.

The Referee: It may go out.

The Witness: We decided to buy it. We called Mr. Darling up and made an appointment with him and went in and had a talk with him, and he said that some one else was negotiating for it.

Mr. Davis: Q. And did he tell you who that some one else was?

A. No, didn't ask.

Q. Did you know at that time who it was?

A. No, I didn't know who it was. I had an idea who it was.

Q. Hadn't you been advised by Al Newton that M. Philip [292] Davis had an option on it?

A. I had not.

Q. What else was said?

A. So we went up and had a talk with Mr. Darling; and I started talking around \$10,000 for it. And he told Mr. Brown and I that that was out. So in the meantime he said as far as he was concerned he wasn't anxious to sell it because he only had—he said he only had a small part of it and that as far as he was concerned it didn't make any difference but he would get in touch with Mr. West and if Mr. West would consent he would sell the contract. So I think that—he did tell us that he didn't think that it would be any cheaper than \$15,000. So I naturally asked him if he would see what he could do around \$12,500. So then a couple of days later I got a call from Mr. Darling, and he said he couldn't do anything on \$12,500, and that he wouldn't even talk about it

(Testimony of Edward A. Gerety)

and it was \$15,000 or forget about it. So I told him I would let him know in a day or two. So in two or three days I got in touch with Mr. Brown and told him the story and just how they felt about it. So we still decided to go ahead. So we made an appointment and went up to his office and purchased the contract.

Q. Now at the time you purchased the contract did you know how much money the Abbot Kinney Company had in its accounts?

A. Oh, I usually knew how much they had. I was purchasing [293] that contract for ourselves, and I didn't—as far as the company was concerned, I didn't know exactly; but I knew approximately.

Q. Those books were under your jurisdiction, you testified? A. That's correct.

Q. And then what did Mr. Brown say when you reported back to him that Mr. Darling was willing to sell?

A. Well, he said he would think it over, and it looked like he would go ahead. So I met him, I think it was, the same day or the next morning; and then he called me and he said, "Well, if you want to go, let's go ahead with it."

And I want to explaint one thing: there at the beach its a very small town, there is one street or one pier. It is not like in Los Angeles here, where you necessarily have to go to an office. But here you run into the same fellow maybe ten times in one day if you are on the street. That is why a lot of these conversations are held on the street or on the pier.

The Referee: Go ahead.

The Witness: So—

(Testimony of Edward A. Gerety)

Mr. Davis: Q. Then did you decide what percentage interest you would take?

A. Yes, he asked me how much I would want. I said I thought I could go a third on it.

Q. Did he tell you that he would take part of it?
[294]

A. He said he would take the other two-thirds.

Q. Did he mention that anybody else had an interest in it?
A. He did not.

Q. Did you ever mention to any one that you and Charley Brown and another person owned that contract?

A. I did not.

Q. And then you went up to Hugh Darling's office with the money?

A. With the cashier's checks, yes.

Q. Yes. Now you had—how was your money—

A. My money was in the safe deposit box.

Q. And where was that safe deposit box?

A. One of them is in Los Angeles here at the Security Bank, and one is at Ocean Park in the Security Bank.

Q. You carry your cash in those accounts, do you?

A. I do, yes. And then I have an account here in Los Angeles and one in Venice, too.

Q. You got the cashier's checks where?

A. I got one in Ocean Park, I got one in the Bank of America over here (indicating).

Q. What were the amounts of those?

A. The one in Ocean Park was \$2500.

Q. And what was the other one?

A. The other one over here was \$1500, and I gave Mr. Brown at the Bank in Venice \$1,000 in cash. [295]

(Testimony of Edward A. Gerety)

Q. So that you had two cashier's checks?

A. I had two cashier's checks which shows in the—

Q. One for \$2500, one for \$1500?

A. That is correct.

Q. And you gave Mr. Brown \$1,000?

A. Yes. He was making out—I had some money in the safe at home, and he was making out the check for \$5,000. So I said, "Charley, I don't want to carry this money uptown." So I gave him a thousand dollars. So that was six—he had \$15,000. I had the two cashier's checks, which made \$4,000, and gave him \$1,000, and the two together was \$5,000.

Q. You took that money to Mr. Darling?

A. To Mr. Darling; and we got a receipt for it.

Q. And you obtained that assignment which has been introduced in evidence? A. That is correct.

Q. After you had received the contract, what did you do?

A. I got an assignment from Mr. Brown for my third of the contract.

Q. Yes.

A. And a couple of days later, after we got the contract, I bumped into Al. Newton and told him that we had bought it—things get around there very quick. And he asked me if I wanted to sell him a piece of it. I told him no.

Q. So what did you do?

A. I kept one-third. [296]

Q. What did you then do?

A. Oh—well, that was one day. Then Mr. Williams came in, and he had heard about it. And he came in the office—

(Testimony of Edward A. Gerety)

Q. I am just asking you what you did, Mr. Gerety.

A. All right. So then—oh, I guess it was a week or so later Mr. Brown and I got together, and we thought that the company should pay off the money on the contract.

Q. If I should call your attention to the fact that June 13th was the date on which the assignment was made and June 20th was the date of the Executive Committee meeting at which \$7500 was authorized, would that refresh your recollection as to time?

A. Well, that would make it a week.

Q. So after you got the assignment, what did you do in regard to attempting to collect on it?

A. I got together with Mr. Brown, and we thought that the company should start paying some money on that contract. They had already had a notice to turn the water off, and they had received benefits all this time on the thing, which reduced our insurance rates. The rate under the contract was 92 cents for a hundred; and after they took it off the contract—I mean the sprinkler system—and made it semi-sprinkler—the rate now is \$3.50.

Q. So what did you do then?

A. So Mr. Brown prepared a demand on the company for \$7500. [297]

Q. Was that a written demand?

A. I think it was.

Q. And did you help him prepare that demand?

A. No, I talked to him about it. I didn't help him prepare it.

(Testimony of Edward A. Gerety)

Q. Then what happened to that demand?

A. That demand—as I understand, he came into the Executive Committee with the demand personally. And I was not there—

Q. You were not present at that time?

A. I was not present at that time, no.

Q. You knew that he was going to make the demand on that day, did you?

A. I didn't know whether he was going to make the demand that day or the following week, but we decided to make it.

Q. Did you tell him when the Executive Committee was meeting?

A. I think he knew when it was meeting. The Executive Committee meets regularly every Tuesday at 2 o'clock.

Q. So that, as far as you know, you don't know what took place when he made that demand?

A. I do not.

Q. When was the next—did you talk to Mr. Harrah about the demand, Mr. Gerety?

A. I did not.

Q. Did Mr. Harrah talk to you about the demand?
[298]

A. No, as I remember, the Executive Committee minutes were written up—

Q. Who prepared those Executive Committee meeting minutes as of that date, November 20th, 1944?

A. I don't know whether they made the notes for me to prepare it. Sometimes I wrote it, and sometimes Mr. Harrah or Newton would write them.

(Testimony of Edward A. Gerety)

Q. Do you recall whether you wrote them that day?

A. I know I didn't write them that day.

Q. Did you write them up for that date?

A. No, I did not.

Q. Did you talk to Mr. Carleton Kinney about the demand? A. I did not.

Q. Did Mr. Carleton Kinney come to you and ask you anything about it? A. Not a thing.

Q. Had you told the members of the Executive Committee that you owned an interest in that contract as of that date?

A. Yes, everybody at that time knew I had an interest in it. It was no secret.

Q. And did they ever ask you what you would settle that contract for on behalf of the company?

A. No, they didn't.

Q. No question was raised as to what you and Mr. Brown would take for that contract by the company—

Mr. Kitzmiller: You are speaking now of the corporation, [299] asking him on behalf of the corporation?

Mr. Davis: That is right, Mr. Harrah or Mr. Carleton Kinney or Mr.—

Mr. Kitzmiller: Newton?

Mr. Davis: Al. Newton.

The Witness: No, he didn't say a word.

Q. As a matter of fact, Mr. Newton wasn't present at the time that that \$7500 was paid or authorized by the Executive Committee, was he?

A. I didn't know whether he was or not until after I read the minutes.

Q. You found out at that time?

A. I think so.

(Testimony of Edward A. Gerety)

Q. Now after Mr. Brown made the demand, what happened?

A. Well, there was—the minutes showed that they had been approved. And after the minutes were signed, the bookkeeper made the check.

Q. Did you instruct the bookkeeper to make the check?

A. I don't remember whether I did or not on that. I doubt it, because I wasn't there; and when the girl typed the minutes and they were signed—I don't know whether it was made that day or the next day.

Q. But in any circumstances you knew that the check was being drawn?

A. Yes, either being drawn or had been drawn.

Q. And when it was drawn, did you deliver it to Mr. Brown? [300]

A. I did not.

Q. Who delivered that to Mr. Brown?

A. I don't know whether Mr. Brown came into the office and got it from the bookkeeper. That was the usual procedure. I had nothing to do with delivering any checks to anybody or receiving any money.

Q. Did you receive part of that \$7500?

A. I did.

Q. When did you receive your share of it?

A. Oh, I don't know exactly when it was. Some time had elapsed, and I got a check from Mr. Brown.

Q. Was that a cashier's check or—

A. No, just a regular check, as I remember it.

Q. Now after you received the \$2500, did you then make a further demand upon the company for payment?

A. As I recollect, on that—that the water wouldn't be shut off for three or four months or whatever it was; and

(Testimony of Edward A. Gerety)

after the time had elapsed, we thought that something should be done on it as we were still carrying the insurance on that property.

The Referee: I beg your pardon?

A. I said we thought that something should be done as the sprinkling system was still carrying that rate on the property.

The Referee: Q. You said "we were still carrying the insurance on that property." Do you mean for us to understand [301] that you and Mr. Brown were paying the insurance premiums?

A. No, we were furnishing the means whereby they would have the rates.

Mr. Davis: Q. You mean just because that sprinkling system was in there the rates were lower; is that right? A. That's right.

Q. So what did you do?

A. Well, it was some time later than that I had a discussion with Mr. Brown about it. In fact, we talked about it a couple of times and looked the contract over; and we saw that the yearly payments were \$30,000 a year. And after two or three discussions, why, we decided that there would be a payment made on the contract. So Mr. Brown and I discussed it—in his office this happened to be; I remember that one—and he wrote out the demand.

Q. I see. And you were there at the time he wrote out the demand, were you?

A. I don't remember. I know we discussed it. I think it was, oh, maybe on a Sunday, Saturday or Sunday. In the amusement business days don't mean anything to us. So that—it was just before he presented his demand, I

(Testimony of Edward A. Gerety)

know that. So as far as my being there when he wrote it out, I don't think I was.

Q. Were you there when he discussed the matter with Mr. Pool?

A. I was not. I didn't know he even discussed it with [302] Mr. Pool.

Q. Then that demand was served upon the Executive Committee, wasn't it?

A. That's correct.

Q. And you were present at that time, were you?

A. I was not, no.

Q. You did not attend that meeting?

A. I did not attend that meeting.

Q. Ordinarily you would attend the Executive Committee meetings?

A. I had attended them. I was in and out—if they wanted me, if I had anything to bring up; otherwise they discussed matters themselves.

Q. As a matter of fact, you had to be there in order to advise them on the conditions of the business on the pier, did you not, Mr. Gerety?

A. It didn't take me all the meeting to tell them all I had to tell them. If they wanted to discuss things without me, I knew it and wouldn't be in.

Q. The Executive Committee meetings were always held in your private office there on the pier?

A. Yes, they usually were.

Q. So that you had to get out of your office in order for them to hold their meetings?

A. That would be right.

(Testimony of Edward A. Gerety)

Q. And on that particular date, November 7, 1944, at the [303] hour of 2 o'clock, p. m., they held a regular Executive Committee meeting?

A. I think that's correct.

Q. Were you at the meeting when it first started?

A. I wasn't at the meeting at all.

Q. Were you on the pier at that time, do you recall?

A. I am sure I was around some place.

Q. And you knew that Mr. Brown was going to make his demand at that time, did you?

A. I didn't know whether he was going to make it then or the following week. I was in and out all the time there. I didn't have any—

Q. Now, Mr. Gerety, you knew that a special meeting of stockholders was to be held the next day, did you not?

A. Was that the next day?

Q. Yes.

A. I think there was one going to be held. Yes, I knew that.

Q. And you knew that the purpose of that was to elect a new Board of Directors so that we could oust the Executive; isn't that so—rumors travel pretty fast down there, do they not, Mr. Gerety?

A. Well, you hear things, yes.

Q. And you knew that was what it was about?

A. You hear things.

Q. And that was in the wind, that the Executive Committee [304] was going to be ousted from power because of all these things that had been happening; isn't that so?

A. I don't know what you mean by "these things happening."

(Testimony of Edward A. Gerety)

Q. I mean you knew the Executive Committee was going to have its authority terminated the next day after if it could possibly be done?

A. No, I wasn't so sure they would.

Q. You knew also at this time, Mr. Gerety, that the Abbot Kinney Company was in bankruptcy proceedings?

A. I knew that, but I knew there wasn't any merit to it.

Mr. Davis: I move that be stricken.

Mr. Cobb: We submit that is quite material.

The Referee: Deny the motion.

Mr. Davis: Q. But you knew that a petition in bankruptcy had been filed? A. Yes.

Q. And you knew that counsel had been employed to represent the company?

A. Wait a minute, let's see whether I did or not. I think so, yes.

Q. And you knew that the counsel was Hiram Casey and Harold Pool? A. Yes.

Q. And you knew all this on the date on which the demand was made, which was on November 7th? [305]

A. Well, I had heard those rumors, yes.

Q. Now do you know what happened in that Executive Committee meeting?

A. No, I don't know exactly what happened. I know when I came back, why, that they were authorized to pay the check.

Q. When did you come back after they authorized the payment of the check?

A. I am trying to think—oh, it might have been before they got finished or an hour or so later.

(Testimony of Edward A. Gerety)

Q. Could it possibly have been while they were still carrying on the meeting?

A. Could have been that I was in there before or after. I am not quite sure.

Q. Were the minutes drawn up immediately after the meeting?

A. I don't know whether they were drawn up that night or the next morning.

Q. The check of \$30,000 was made payable to Charles Brown and was dated November 8, 1944. Was that delivered to Mr. Brown the morning of the 8th, do you recall?

A. No, I couldn't say whether it was delivered to him on the 7th or the 8th. But if it was delivered on the 8th, I imagine it would have been delivered that morning. I didn't deliver it.

Q. Were you present when it was delivered?

A. No, I was not. [306]

Q. Do you know who delivered it to him?

A. I think Mr. Mapes did. He is the bookkeeper.

Q. Did you instruct Mr. Mapes to draw the check for \$30,000?

A. I think the Committee did, because I wasn't there.

Q. Do you know how much money the Abbot Kinney Company had on its books on deposit or with Mr. Harrah on the 7th day of November, 1944?

A. Oh, I was under the impression it was somewhere around \$40,000, more or less.

Q. How much less, would you say?

A. Oh, maybe \$38,000, something like that.

(Testimony of Edward A. Gerety)

Q. Is \$33,000 closer, Mr. Gerety?

A. I don't remember right now. I thought it was around \$38,000.

Q. How was that check made? Where did the company get the money to pay the check?

A. There wasn't that kind of money in the bank, because we drew that out on account of that judgment against us on appeal. And they were made out to the Kinney Company and were given to the treasurer, Mr. Harrah. And as to whether he brought those checks over to Mr. Mapes, I don't know.

Q. But in any circumstances Mr. Harrah would have had to deposit those checks in order to—

A. No, everything was deposited through the office. If it was 25 cents—nobody had any right to deposit or cash [307] any checks of any kind.

Q. In other words, Mr. Harrah had to bring the checks in for deposit before there was enough in the account to meet the check for \$30,000?

A. That would be right.

Q. As I understand, the reason you did not keep this money in the account was because you didn't want to have your account depleted by an attachment; is that right?

A. Yes.

Mr. Heap: If the Court please, that has been asked and answered at least ten times.

The Referee: Yes. Mr. Davis, go on.

Mr. Davis: Q. After that \$30,000 check was paid, did you receive a part of it?

A. I did.

Q. How much did you receive?

A. A check for \$10,000.

(Testimony of Edward A. Gerety)

Q. That was paid in a check?

A. That's correct.

Q. When did you receive that?

A. A few days later, I guess—or shortly afterwards.

Q. Did you cash that check? A. I did.

Q. What did you do with the money?

A. I bought cashier's checks with it; and then when these proceedings came up, I deposited it with the Court, I gave it [308] to the Court.

Q. The \$2500 that you received, what did you do with that money, Mr. Gerety?

A. Put that in my safe deposit box.

Q. That was in cash, was it?

A. No, it was a check. I told you already it was a check.

Q. That was a cashier's check, was it?

A. I don't think so. I think it was just a regular check.

Q. Did you just deposit the \$2500 check in your—

A. No, I don't keep a checking account down there. I have a checking account in Los Angeles.

Q. I asked you what did you do with the \$2500 you received.

A. I cashed the check and put it in the safe deposit box.

Q. You cashed the check?

A. Yes. That is the way I do business. The amusement business is a little different than you lawyers.

Q. Now when did you first find out that William Harrah had an interest in the contract?

A. I think just before Charley came to me and said he was going to sell Bill a portion of the contract—in

(Testimony of Edward A. Gerety)

fact, he didn't ask me anything; said he had sold the contract, as I recollect.

Q. He just came and told you he sold it?

A. I recollect it that way.

Q. Did you ever talk to John Harrah about the purchase of the contract before purchasing it? [309]

A. I did not talk to John Harrah about the purchase of it.

Q. Did you ever talk to Al. Newton about the purchase of the contract before you purchased it?

A. I don't—I told him about it afterwards and he wanted a piece of it. That means he wanted to buy a portion of it.

Q. Did you ever talk with William Harrah about the possibility of purchasing it?

A. I did not. I haven't seen Bill Harrah for four or five years.

Q. Now how long did your employment last after you received your share of the \$30,000?

A. I don't remember exactly. It wouldn't be very long; it was just about that time you fellows moved in.

Q. You received your share of the \$30,000 immediately after Mr. Brown got it; is that correct?

A. There was some time elapsed there. I don't know exactly—

Q. As a matter of fact, the new Board of Directors didn't take possession of the office down there until some time in December?

(Testimony of Edward A. Gerety)

A. Yes, they did. They took charge there, I think it was the day before—before the first of the month, because I know—

Q. They took charge the date on which we got judgment in the Superior Court determining that the Board had been [310] properly elected?

A. That was in November, I am pretty sure, because you and Rusty come down; and by the time you got there, Rusty had taken charge of everything.

Q. And that was after our action in the Superior Court? A. That same day.

Q. The same day?

A. Yes. You were very—

Q. We were very prompt, weren't we, Mr. Gerety?

The Referee: Gentlemen, will you please proceed?

Mr. Davis: I think that is all, your Honor.

The Referee: Cross-examine, or do you want to call him as your own witness?

Mr. Kitzmiller: Oh, I think call him as our own witness.

The Referee: Does anybody want to examine at this time? Step down. Call your next witness, Mr. Davis.

Mr. Davis: I would like to get a ruling on Carleton Kinney, your Honor, as to whether I can call him as an adverse witness under 21-J. I would like to put him on the witness stand. He was also—although he is not a party to the litigation, he is an adverse witness; and he

was one of the members of the Executive Committee that voted in favor of the payment of both the \$7500 and the \$30,000.

The Referee: There is no doubt about that, is there, that he voted in favor of the payment of the money?

Mr. Cobb: No, your Honor; but I submit that that does not [311] make him an adverse witness under 21-J, because any act that a party participated in would make him an adverse witness if counsel wanted to differ with him on that act.

Mr. Davis: I think this is the very issue before your Honor.

The Referee: I think you should proceed with your examination. If it should appear to be necessary to resort to cross-examination tactics, then we will rule on the question of whether he is an adverse witness.

Mr. Grainger: Probably more important is the question of being bound by—

The Referee: Being bound by his testimony—

Mr. Davis: That is of more importance, I think, your Honor, because he has definitely shown in every action since we have been in this matter that he is an adverse witness. The 21-A proceedings and the whole proceedings indicate that. I don't desire to call him as our witness, but I do feel we are entitled to call him under 21-J. I will put him on for the purposes of qualifying him, subject to the rulings of your Honor.

The Referee: Call the witness. [312]

CARLETON KINNEY,

called as a witness on behalf of the petitioning creditors,
being first duly sworn, testified as follows:

The Referee: Q. What is your name, sir?

A. Carleton Kinney.

Q. How do you spell that, please?

A. C-a-r-l-e-t-o-n.

The Referee: All right, proceed.

Direct Examination

By Mr. Davis:

Q. What is your business or occupation, Mr. Kinney?

A. Well, I am operating the Ship Cafe.

Q. And you are the son of Abbot Kinney, the founder
of the Abbot Kinney Company?

A. Yes, I am.

Q. Have you ever held an office in the Abbot Kinney
Company? A. Yes, I have.

Q. You were president of the company, were you not,
for some time? A. I was.

Q. When were you elected president of the company?

A. Well, I can't fix the year. My father died in 1920;
and the elder brothers were president for quite a long
space. There were two brothers were president for quite
a while, [313] each one of them; but I think that I was
probably made president around '36 or '37, about the time
that this six-party agreement was formed.

Q. And you have been acting as president ever since
then until about November, 1944?

A. About the time you fellows put me out.

Q. That is, when the new Board of Directors was
elected? A. Correct.

(Testimony of Carleton Kinney)

Q. And you were president during all that time?

A. Yes.

Q. You were also elected as a member of the Executive Committee about—the latter part of 1938?

A. Well, whenever the Executive Committee was formed, I think I was one member of it.

Q. You were one of the original members of the Executive Committee, were you not, Mr. Kinney?

A. Yes, whatever year that was. I don't recall which year.

Q. And you continued to act as a member of the Executive Committee until it was dissolved by the new Board of Directors in the latter part of 1944?

A. That's right.

Q. You attended the Board of Directors' meetings of the Abbot Kinney Company, did you, from 1937 on?

A. I did.

Q. And did you attend the Executive Committee meetings [314] after you were elected to that office?

A. I did.

Q. Now do you recall in May of 1944 that a notice to the members of the Board of Directors was sent out calling a special meeting for May 3rd?

A. I recall there was a —there was a meeting called, but—I mean the stationery was written from the Davis offices.

Q. From the offices of Nicholas and Davis, was it?

A. Yes, just the date of that I can't recall.

Q. And that called for a special meeting of the Directors of the Abbot Kinney Company?

A. I believe so.

(Testimony of Carleton Kinney)

Q. Yes. Now you refused to attend that meeting along with John Harrah, didn't you?

A. Yes, that's right.

Q. And you refused to do it knowing that we couldn't constitute a quorum of the Board without your appearance?

A. Well, that wasn't the reason for it. I wanted a full Board there. I wanted every member of the Board present or I didn't want a meeting until they could all be present.

Q. In other words, you were not going to be there to constitute a quorum with Helen Kinney Ward back in Oklahoma?

A. That could be so.

Q. Yes.

The Referee: Just a minute, Mr. Davis. I think we had [315] better adjourn at this time. Ten o'clock tomorrow morning. All the witnesses are instructed to return at that time.

Mr. Heap: If the Court please, I am here on behalf, as you know, of William Harrah and am trying to co-operate as well as I can by saying as little as I can. I have a very important matter that I promised Judge Harrison would go to trial; and I have asked Mr. Vernon, one of my associates, to sit here tomorrow in the event I cannot be here.

The Referee: That is entirely satisfactory. [316]

Los Angeles, California. Thursday, July 26, 1945. 10:00 o'clock, a. m. session.

The Referee: All right, gentlemen, are you ready?

Mr. Vernon: Your Honor, I am O. S. Vernon, appearing in the stead of Mr. Heap.

The Referee: Thank you, Mr. Vernon. All right, gentlemen, are you ready?

Mr. Davis: Ready, your Honor.

The Referee: Mr. Carleton Kinney is on the stand. Come forward, please, Mr. Kinney. Be seated. You have been sworn.

Mr. Davis: I wonder if we might have that last question, Mr. Reporter?

(The reporter read the following question: "In other words, you were not going to be there to constitute a quorum with Helen Kinney Ward back in Oklahoma?")

CARLETON KINNEY,

recalled for further

Direct Examination.

By Mr. Davis:

Q. And as a result of your failure to appear at that meeting, the meeting was not constituted as a quorum?

A. I would say so.

Q. Thereafter you continued to serve on the Executive Committee? [317]

A. I did.

Q. And you continued to hold meetings of the Executive Committee?

A. Yes.

(Testimony of Carleton Kinney)

Q. And you continued to pass upon the problems of the company as they were presented to the Executive Committee? A. Right.

Q. How often did you hold Executive Committee meetings, Mr. Kinney?

A. Usually once a week, a fixed day.

Q. Well, were there times when you didn't hold meetings once a week?

A. Yes, there was.

Q. When was that, do you recall?

A. I can't recall. I mean probably some of the Executive Committee meetings—the minutes of some of the Executive Committee meetings—would show that probably there was no meeting by not having any minutes for that week.

Q. You kept accurate minutes of your meetings, did you?

A. I didn't keep them personally; but the minutes were kept of the meetings quite accurately.

Q. And before you signed them, you always checked them to be sure that they stated what had happened at the meetings?

A. That's right. I always read it before I signed it.

Q. Yes. Now, referring to the sprinkling system contract, when did you first learn that Eddie Gerety and Charley [318] Brown had been negotiating for the purchase?

A. I learned after the purchase was made.

(Testimony of Carleton Kinney)

Q. How long after the purchase was made did you learn?

A. I can't fix the time. It couldn't be possibly any longer than two weeks, and it could have been five or six days afterwards.

Q. Now the first time the matter was officially brought before the Executive Committee was on the 20th of June, 1944, at which time a demand for \$7500 was made; is that correct?

A. Well, there was a demand made. The exact date I don't dememner. I think it says the 20th here (indicating). We have read things in court that fixes it the 20th of June.

Q. Just a moment, and I will show you these minutes. I call your attention to the minutes of the regular meeting of the Executive Committee held June 20, 1944, 2 p. m., and signed by John Harrah and another signature purporting to be that of Carleton Kinney. Is that your signature? A. It is.

Q. I call your attention to paragraph II thereof, where it says, "It was ordered that \$7500 be paid on the sprinkler contract to Charles Brown, accepting his offer—"

I ask you, Mr. Kinney, is that the first time that you knew that the contract had been purchased by Charles Brown?

A. No, I believe I knew it a day or two before that.

Q. And who advised you of the purchase?

A. Well, I don't just recall. I think that probably [319] Eddie Gerety—

Q. What did Eddie Gerety say to you?

A. Well, he said that Charley Brown had purchased the sprinkler contract—

(Testimony of Carleton Kinney)

Q. And did he tell you how much Charley Brown had paid for it?

A. He told me, but I don't know whether he told me when he said—whether he told me a couple of days later.

Q. Did he say anything to you about any interest which he claimed to own in the contract?

A. Not at that time.

Q. He did not mention to you at that time, then, that he owned any interest in the contract?

A. Not that I recall.

Q. Now when the meeting was held on the 20th of June, who attended that meeting?

A. Well, there was John Harrah, Eddie Gerety, and myself, as I recall, and Charley Brown.

Q. Eddie Gerety was present at that meeting, as you recall it?

A. Yes.

Q. And what was said by Eddie Gerety and Charles Brown, if anything, regarding the obligation due on the contract and the amount which should be paid?

A. I can't state the exact words, but it was to the effect that they wanted \$7500, insisted on having \$7500 to— [320]

Q. Who made that request?

A. That was Mr. Charles Brown.

Q. Mr. Charles Brown. And did Eddie Gerety say anything at that time?

A. I don't believe he did.

Q. Well, did you know at that time that Eddie Gerety claimed to have an interest in the contract?

A. I don't believe I knew at that time that he had.

(Testimony of Carleton Kinney)

Q. You did not know at that time, when the first payment of \$7500 was made, that Eddie Gerety had an interest in the contract? A. That is correct.

Q. Then when did you first learn that Eddie Gerety had an interest in the contract?

A. Well, it was a few days later. I can't state just exactly.

Q. Who told you about it? A. Eddie Gerety.

Q. And where did that conversation take place?

A. I think in the Ship Cafe.

Q. And what was the occasion of that discussion?

A. Well, the Ship Cafe was open for business; and Eddie walked in and mentioned the fact that he had put up some money, part of the money, for the sprinkler contract.

Q. Did you ask him when he had put it up?

A. No. [321]

Q. What did you say to him when he told you that?

A. I didn't say anything, I don't think.

Q. Did you ask him why he didn't tell you that some time before you made that payment of \$7500 that he owned an interest in it? A. No.

Q. If he had told you, would that have made any difference in your vote?

Mr. Cobb: We object on the ground that it calls for the conclusion of the witness and is not asking for testimony on a fact.

The Referee: Overruled.

The Witness: I don't think it would.

Mr. Dais: Q. Now in 1943, January, an offer of the Cruickshank Company to sell the contract to the Abbot Kinney Company for \$10,000 was made to the

(Testimony of Carleton Kinney)

Executive Committee through Al. Newton; isn't that correct?

Mr. Cobb: We object on the ground that it assumes facts not in evidence. The evidence shows the offer was made to Mr. Davis.

The Referee: Sustained.

Mr. Davis: If your Honor please, the minutes I read from show that the offer was made to Al. Newton in 1943.

The Referee: It is immaterial. Eliminate that from your question.

Mr. Davis: Q. Calling your attention, Mr. Kinney, to an [322] offer that was made in January of 1943 to the Abbot Kinney Company to purchase the sprinkling system contract for \$10,000, do you recall that proposition?

A. Yes, I recall that the \$10,000—I don't recall the amount, but there was an offer for us, for the Kinney Company, to purchase the sprinkler contract.

Q. I refer to the minutes of one of the meetings of the Executive Committee, that of January 14, 1943, which reads as follows:

"The offer of H. S. West to cancel the F. R. Cruickshank sprinkler contract for the sum of \$10,000 was proposed by Al. Newton, who voted for the acceptance of the proposition. John Harrah voted no on the proposition. Carleton Kinney was absent from the meeting."

I call your attention that you signed the minutes of the meeting.

A. Yes.

(Testimony of Carleton Kinney)

Q. How long after that meeting did you sign the minutes?

A. Well, sometimes, if the minutes were completed, in a day, and sometimes three or four days. But in the course of walking in and out of the office, if that was typed up, it would be handed to me and I would sign it.

Q. And at the time you signed it, you read those minutes? A. Yes.

Q. Did you ask John Harrah at that time why he had voted [323] against buying that contract for \$10,000?

A. At the meeting or before the meeting?

Q. Did you ask him when you saw those minutes? Did you ask him why he had voted against buying it?

A. No, I don't think I asked him.

Q. Did you go to him and tell him that you thought we ought to try to make arrangements to buy that contract at that price?

A. I knew there was no use, because there wasn't any money in the treasury enough to cover that.

Q. Did you make any effort at all at that time, Mr. Kinney, to arrange for the purchase of that contract?

A. Well, I knew the contract was a valuable thing for the Kinney Company to have to get rid of that obligation; but there was only two or three thousand dollars in the treasury and we couldn't borrow any money at the banks for the Abbot Kinney Company and I didn't see any use in trying to fool around, trying to buy it for the Kinney Company when there was no money to buy it with.

Q. Did you discuss it at all with Mr. Harrah?

A. Yes, I think I did.

(Testimony of Carleton Kinney)

Q. What did you say to Mr. Harrah about it?

A. Well, in substance—I can't recall just what I said—I voiced an opinion that it would be a fine obligation to get rid of from the Kinney Company. And then I previously—after I knew about it—I checked the amount of money that [324] was in the company, knew that there wasn't sufficient money to purchase.

Q. Did Mr. John Harrah tell you at that time that he didn't think the contract was worth buying anyway because it was subordinate to the bonded indebtedness and to the taxes of the company?

A. I don't think he said that.

Q. Did he ever tell you that?

A. I don't believe so.

Q. Did he ever tell you that in his opinion the contract didn't have any value so far as the actual liquidation was concerned because it was subordinate to all the other indebtedness?

A. No, I think we had discussed the sprinkling system. And I have been a little bit frightened that somebody might move in with the sprinkling system and tie the company up. And I have spoken to him about that, and—I mean, we owed them a lot of money and it was hard—I mean we didn't have it to pay. And it was better to try to keep them from jumping on the Kinney Company and tying things all up. I mean, there was quite a lot of discussion about the sprinkling system. I mean that from time to time—discussions have gone on for a long time. And I know that—

Q. Is it not a fact, Mr. Kinney, that at the various Directors' meetings, when the matter was discussed, that John Harrah and Lou Halper, supposedly representing

(Testimony of Carleton Kinney)

the bonded [325] interests, always stated that in their opinion the contract had no value and they wouldn't pay one dime on it because there was nothing that could be done to take the bonds from the company as long as there was outstanding—

Mr. Cobb: We object to that, your Honor, on the ground that it is compound; that it is leading and suggestive; and that no proper foundation has been laid.

The Referee: Sustained upon the ground of the form of the question.

Mr. Davis: Q. Is it not a fact, Mr. Kinney, that Mr. Harrah made those remarks?

A. Well, he made some remarks from time to time not to be disturbed about them moving in. He has made various statements like that. Of course the idea is—I mean, the very first time that I can recall that the contract—that it was spoken that it could be bought for \$50,000.

Q. That was about in 1941 or 1942, was it not, Mr. Kinney?

A. As to the year I can't quite place it in my mind, but I mean Rusty Williams had money, and it was discussed that maybe he might pick that obligation up.

Q. As a matter of fact, that was discussed in a Directors' meeting on one occasion at which M. Philip Davis stated that he had been talking to Hugh Darling and that a figure of around \$50,000 had been suggested?

A. Well, I don't recall just that fact. I do remember that the conversation was that Rusty Williams might pick that [326] up or it could be picked up for that amount.

(Testimony of Carleton Kinney)

Q. Now is it not a fact that about the first of June or between the first and the 10th of June, 1944, Al. Newton came to you and said that the sprinkling system contract was still available for \$10,000, and that he thought the company ought to buy it and that if we didn't buy it right away it was liable to be lost because somebody else was dickering for it with Hugh Darling?

A. He never made that remark to me, but I did hear that it was in that condition; that if somebody didn't buy it, it was liable to be purchased or they wouldn't have another chance to buy it.

Q. Who told you that?

A. Well, I can't just recall who it was.

Q. But you do recall that before it was purchased by Charley Brown, just before, that some one did say to you, "Well, if we don't purchase that now, it is liable to be lost to us forever, because somebody is dickering on it."?

A. No, that was mentioned some time before, before this 20th of June.

Q. Well, about when; a couple of weeks before?

A. Well, it seems to me it's quite a time before.

Q. What would you say about that, three weeks?

A. Well, a month or six weeks.

Q. Within that period of a month or six weeks. All right. Now what did you say at that time about the possible purchase [327] of it?

A. Well, I don't recall just what I said.

Q. Did you make any effort at that time to ascertain the availability of that contract for the Abbot Kinney Company?

A. No I didn't make any—

(Testimony of Carleton Kinney)

Q. You were president of the company, were you not?

A. Yes, in name only.

Q. Who was president in fact?

A. Didn't have any.

Q. So you made no inquiry, then, from the time you heard that the contract was being seriously dickered for by an outside party and the time that you found out Charley Brown had bought it as to whether you could get it on behalf of the Abbot Kinney Company?

A. I made no effort, because I just thought the—I mean how much talk there was to it and how much just loose language about it—I mean I got kind of tired. There had been so much dickering that I got kind of tired even thinking about it.

Q. At the time Charley Brown appeared before the Executive Committee on the 20th of June and made his demand, what did you say?

A. Well, I said, "I suppose we'll pay the money."

Q. What did John Harrah say?

A. Something similar. I don't recall just what he said.

Q. Did John Harrah tell you he thought it was a good idea? [328]

A. Well, I don't know whether he said so; but apparently it seems that he thought it was a good idea, because he signed it and it was delivered.

Q. As a matter of fact, he told you that he thought it was the thing to do, didn't he?

A. Well, I don't recall any conversation much other than I signed the check, see—I mean he prepared the thing; and when the check was ready, I signed it.

(Testimony of Carleton Kinney)

Q. You mean he just had the check prepared and presented it to you and you signed it without asking any questions about the contract?

A. No, that isn't the way it is done down there anyway.

Q. What was your answer, Mr. Kinney?

A. I say the checks have to go through a lot of monkey business before they are signed. In other words, it takes a couple of hours or so before they are ready to be signed or maybe a day—usually a day.

Q. As a matter of fact, all you had to do was give instructions to Mr. Mapes, who is in that little front office, and then you and Mr. Harrah sign it. What "monkey business" is there that has to be gone through?

A. You can ask the bookkeeper. They have to do this and that and the other thing, and it takes time.

Q. You mean that they would have to take money Mr. Harrah has in his possession and get it over to the bank and deposit it; is that what you mean? [329]

A. No, I don't mean that. I mean if you are in the office and ask for a check, it takes about an hour or two or three or the next day before it is made out.

Q. Now when this meeting was in progress, did you ask Mr. Harrah what he thought about the necessity of paying the money on that contract?

A. No, I don't think I did.

Q. Well, did you raise any question as to the ability of the company to pay \$7500 at that time?

A. No.

(Testimony of Carleton Kinney)

Q. Did you ask Mr. Mapes how much the company had in its account at that time?

A. I knew that it was at least double that amount or three times that amount.

Q. It was at least three times the amount of \$7500 on June 20, 1944?

A. Well, two or three times. At least I know that there was enough to cover a \$7500 check easily.

Q. A \$7500 check? A. That's right.

Q. So the company had a lot of money, so far as you remember it, in June, 1944?

Mr. Cobb: We object on the ground that it calls for the conclusion of the witness and is not the best evidence.

The Referee: Mr. Davis, you keep on going over and over these things. The witness makes the answer, and then you [330] repeat the answer. Let the record stand as it is. That does not help it any.

Mr. Davis: Q. It is a fact, is it not, Mr. Kinney, that at the time that \$7500 was paid the pier was in very bad condition so far as repairs were concerned?

Mr. Kitzmiller: You called him as your witness; and he has been asked the question and has answered it already.

The Referee: Gentlemen, we are going to have to get along. There will be no further conversation between counsel. If there are any objections, they will be made on legal grounds and addressed to the Court.

Mr. Kitzmiller: I object on the ground that the question has been asked and answered and on the further ground that the only possible purpose of this question would be for the purpose of impeaching your own witness.

(Testimony of Carleton Kinney)

The Referee: Sustained. Proceed.

Mr. Davis: On which grounds is that sustained, your Honor?

The Referee: On all grounds it is sustained.

Mr. Davis: If your Honor please, it is not for the purpose of impeachment. Of course I called Mr. Kinney under 21-J, but the purpose is to show that, unless there was some ulterior motive, in good business none of these directors would have done this if there had not been some other motive.

The Referee: All right, we won't go into the argument, Mr. Davis. Proceed. [331]

Mr. Davis: Q. Now did you have an attorney give you an opinion as to the validity of the contract at the time you voted to have that \$7500 paid on account?

A. No.

Q. Did you have any opinion as to the right to turn off the water at that time?

A. My opinion or an attorney's opinion?

Q. Did you have an attorney's opinion?

A. No, I did not.

Q. Did you ask Mr. Harrah what his opinion was?

A. I don't think I did.

Q. Now at the time—you recall when the petition in bankruptcy was filed in this matter?

A. I know that the petition was filed.

Q. When did you first receive knowledge of that?

A. Well, a few days after it had been filed.

Q. And you knew that Hiram Casey and Harold Pool were employed as attorneys for the company?

A. Yes.

(Testimony of Carleton Kinney)

Q. You knew that a notice of a special meeting of the stockholders had been called for November 8 for the purpose of electing a new Board of Directors?

A. I don't recall just the date, but I know that there was a registered notice sent to me, by registered mail. Just the date—

Q. Well, if I— [332]

Mr. Kitzmiller: We will stipulate it was November 8.

Mr. Davis: Q. Do you recall that an Executive Committee meeting was held on November 7th, at which time \$30,000 was authorized to be paid to Charles Brown on the contract?

A. Well, I recall that there was a regular meeting.

Q. Well, I will call your attention to the minutes of November 7th and see if that refreshes your recollection as to the date.

A. It's November 7.

Q. And that meeting was held at 2 o'clock of that date?

A. I believe so.

Q. Now at that time Mr. Brown came in with a written demand for \$30,000; is that correct?

A. That's right.

Q. And what did you say at that time, if anything, when Mr. Brown made the demand?

A. Well, I read the demand and—I don't think I had much to say.

Q. Did you ask Mr. Mapes, the bookkeeper, how much money the company had available?

A. No, not at that time.

Q. Now what did Mr. Harrah say about the payment of the \$30,000?

A. He said it should be paid.

(Testimony of Carleton Kinney)

Q. And did you make any inquiry as to what position the company was in as the result of the bankruptcy proceedings— [333] as to the payment of the \$30,000?

A. Well, I knew that a petition in bankruptcy was filed.

Q. Did you make any inquiry of Mr. Harrah as to what effect that had on the right of the company to pay the \$30,000?

A. Well, I will ride on Mr. Harrah? If I knew that—I mean he has been an attorney, and he knows a little about law.

Q. In other words, you took Mr. Harrah's word for the fact that the payments should be made?

A. Well, no, we were discussing what effect the petition in bankruptcy had on paying that amount, weren't we? I mean I took his—I mean I felt that if his opinion was that we should pay it, that the bankruptcy situation—I mean that I wasn't violating anything on account of the bankruptcy petition being filed.

Q. Mr. Harrah made those statements at that time?

Mr. Cobb: We object to that on the ground that—

The Witness: No, that's what I thought.

Mr. Davis: Q. Was there any statement made by Mr. Harrah?

A. The only statement was that we had better pay it.

Q. Now did you make any inquiry of Mr. Pool, who was one of the attorneys for the company, as to the advisability of paying the \$30,000 on demand of Mr. Brown?

Mr. Cobb: We object on the ground that it has been asked and answered. [334]

The Referee: Sustained. He said he had no legal advice.

(Testimony of Carleton Kinney)

Mr. Davis: I thought that was limited to the \$7500, your Honor. If I am not in error—

The Referee: No, he said he had no legal advice.

Mr. Davis: Q. So you voted to pay the \$30,000?

A. Right.

Q. Now just prior to that time, Mr. Kinney, you had voted to satisfy an obligation of your own to the Abbot Kinney Company of about \$1400 for a bond which you paid around \$600 for; isn't that right?

Mr. Cobb: Just a moment. We object on the ground that it is leading, irrelevant, incompetent, and immaterial; has no bearing on the issues of this case.

The Referee: Sustained.

Mr. Davis: I believe that is all, your Honor.

The Referee: Do you want to cross examine or call him as your own witness?

Mr. Cobb: I haven't any questions.

The Referee: Have you any questions, gentlemen?

Mr. Vernon: No questions.

Mr. Heap: No questions.

The Referee: Thank you, Mr. Kinney.

Call your next witness.

May this witness be excused?

Mr. Davis: Yes, your Honor.

The Referee: All right, Mr. Kinney, you may be excused. [335]

Come forward, please, Mr. Newton.

ALFRED ARTHUR NEWTON,

called as a witness on behalf of the petitioning creditors, being first duly sworn, testified as follows:

The Referee: Be seated, please, what is your name?

A. Alfred Arthur Newton.

Direct Examination

By Mr. Davis:

Q. What is your business or occupation, Mr. Newton?

A. I am an engineer.

Q. Have you ever been employed by the Abbot Kinney Company?

A. I've been a director of the Abbot Kinney Company for many years.

Q. When did you first become a director of the Abbot Kinney Company? A. I think in 1937.

Q. And did you go on the Board of Directors at the same time as Mr. John Harrah?

A. I did, approximately the same time.

Q. Were you acquainted with Hugh Darling?

A. Yes.

Q. Was Hugh Darling a member of the Board of Directors about that time? [336]

A. I think he was elected a little bit later than I was but approximately the same time.

Q. How long did Mr. Hugh Darling serve on that Board? A. A year or two years.

Q. During the time Mr. Darling was on the Board did you ever discuss the F. R. Cruickshank Company contract?

A. I think that I brought it up at one or two meetings. We had had a general settlement in regard to the Cruick-

(Testimony of Alfred Arthur Newton)

shank contract prior to the time that we all went on the Board.

Q. That was pursuant to the supplemental agreement, was it, dated in December, 1937? A. Yes.

Mr. Kitzmiller: I doubt if it was the supplemental agreement. Isn't it the other agreement rather than the supplemental?

Mr. Davis: No, it is the supplemental.

Q. Do you refer to the supplemental agreement dated the 29th day of December, 1937? A. Yes.

Q. Now from the date of that settlement to the date on which Charles Brown purchased the Cruickshank Company contract was any money paid on account of that indebtedness? A. No.

Q. Who were the members of the Board of Directors of the Abbot Kinney Company during the period that Mr. Darling was on the Board? [337]

A. Mr. John Harrah, myself, Mr. Carleton Kinney, Mr. Sherwood Kinney, I think, during the first part of that time, Mr. Louis Halper, Mr. Tom Davis. I think that was seven.

Q. Now at any of those meetings was the question of the value of the Cruickshank Company contract as a claim against the company discussed?

A. Well, at that time it was concluded that we would carry out the contract of 1937 and pay off the contract.

Q. Are you acquainted with Eddie Gerety?

A. Very well.

Q. How long have you known Eddie Gerety?

A. Well, I guess for 25 years.

(Testimony of Alfred Arthur Newton)

Q. Would you consider yourself a close personal friend of Eddie Gerety's?

A. I have always considered myself so.

Q. Now where do you reside, Mr. Newton?

A. Well, I resided at 46 Club House—45 Club House.

Q. Where is that, in Venice?

A. That is in Venice.

Q. How long have you lived in Venice?

A. From about 1913.

Q. And during most of that time were you acquainted with Eddie Gerety?

A. I think I first knew Eddie about 1919; but I wouldn't say that that was the first.

Q. Now did you know Eddie Gerety when he first became [338] manager of the Abbot Kinney Company?

A. I was away at that time, I believe. I knew Mr. Gerety as manager, and we started to get to know each other very well and have a great deal of confidence in each other from about 1929.

Q. And in 1929 Mr. Gerety was the manager of the Abbot Kinney Company—of your own knowledge?

A. That is correct.

Q. And how long did he continue in that position?

A. Well, he has been manager of the Abbot Kinney Company ever since until a few months ago, except during the time when he was managing it in the capacity of receiver.

Q. But he has continuously been managing the affairs of the Abbot Kinney Company since you have known him and since 1929?

A. That is correct.

(Testimony of Alfred Arthur Newton)

Q. Now when you went on the Board of Directors in 1937, state what the Board did, if anything, in regard to continuing Mr. Gerety as manager?

A. Why, continuing him as manager.

Q. And what were Mr. Gerety's duties as manager of Abbot Kinney Company? A. Well—

Mr. Cobb: We object to that on the ground that it calls for the conclusion of the witness; that no proper foundation has been laid; and that no time is fixed. [339]

The Referee: Overruled.

The Witness: Mr. Gerety's duties as manager were to represent the company before the meetings at various times at which the company had to be represented, to take up tax matters before the Board of Supervisors, to hire the people, to fire them when necessary, to recommend to the Board of Directors at the first and later to the Executive Committee various deals that he thought were good for the sale of the property, for the rental of leases, and all of the normal business of the company—wherever the company carried out business with the tenants, Mr. Gerety made his recommendations or carried out the instructions that were given him or took whatever action was necessary.

Mr. Davis: Q. Now did Mr. Gerety's authority continue right up until the time of his discharge in 1944?

A. Never any change in his authority except during the time that he acted as receiver; and I am not sufficiently well acquainted to know what the difference between a manager and a receiver is.

Q. I call your attention to the F. R. Cruickshank Company contract. State whether or not you ever had—whether you ever presented to the Executive Committee—

(Testimony of Alfred Arthur Newton)

an offer to purchase the contract by Abbot Kinney Company? A. I sure did.

Q. When was the first time that you presented that offer to the Executive Committee? [340]

A. We had about a three-day session some time in January, I think it was, 1943.

Q. And who was present and what was said?

A. Well, the first day that we discussed the matter, Mr. Kinney, Mr. Harrah, Mr. Gerety—

Q. Which Mr. Kinney is that?

A. That was Mr. Carleton Kinney—Mr. Harrah and myself were all there.

Q. What was said?

A. And at that time I told them that you had been in touch with Hugh Darling; that Hugh Darling had offered the contract for \$10,500 or \$10,000—I have forgotten which amount is correct, but it shows in the minutes—

Q. The minutes show \$10,000.

A. All right, it was \$10,000—for immediate acceptance; that—I pointed out that we had \$137,000 due; that if we dug up the \$10,000 we would enormously improve the position of the stockholders of the company, we would reduce the liabilities against the company, the whole position of the company would be greatly improved.

Q. What did Mr. Harrah say about that?

A. Well, the first day's argument Mr. Harrah seemed to think that if it was possible for the company to cancel its own debts for a lesser amount technically and properly, it might be a good idea. Then Mr. Carleton Kinney raised the question of the amount that we needed to pay taxes. And I [341] said what would it matter about

(Testimony of Alfred Arthur Newton)

the tax situation when the most that would happen would be that we would have a slight additional amount of interest to pay when we could save such a huge amount for the company and satisfy a creditor who said he would be pleased by it. And I begged and implored them to take action.

Mr. Kitzmiller: I move to strike that "begged and implored."

The Referee: It may go out.

Mr. Davis: Q. What did you say?

A. I said that as long as this debt was outstanding there was a danger that the Cruickshank people would become annoyed and would try to take some action against the thing. Mr. Harrah said he didn't think there was anything much the Cruickshank Company could do. He said that the sprinkling system had got into pretty bad shape, was just old iron, that he didn't think that it was worth pulling out, that—further, it might be a good idea to pay it off at this time if we could get sufficient money together to do it. I pointed out that we had that amount of money. He said that of course he was interested primarily in the bonds and of course the bonds came ahead of any sprinkling contract; that whereas he could see where I would be interested because it would improve the stock position of the company, he considered the tax situation of more importance. Then he said had I talked to Lou Halper about it. [342]

Q. Yes?

A. And I said no, I hadn't. My recollection is that the first day I called up Mr. Halper and couldn't get him. And he said, "Well, I wouldn't take any action without talking to Mr. Halper or Mr. Williams about it."

(Testimony of Alfred Arthur Newton)

The next day he had cooled off completely.

Mr. Kitzmiller: I move to strike that, please.

The Referee: It may go out.

Mr. Davis: Q. The next day—

A. The next day all of the good points that Mr. Harrah had mentioned in connection with settling the deal he seemed to feel had shrunk to very little importance indeed, and he said that they had—

Mr. Kitzmiller: I object to that—

The Referee: Start all over again.

Mr. Davis: Q. If you will just limit this to what was said—

Mr. Kitzmiller: I move the last answer be stricken.

The Referee: It may go out.

The Witness: The next day Mr. Harrah came to the meeting and said that he had talked to Lou Halper and Lou Halper saw no necessity for buying the contract; that he felt we could probably get that deal through any time we wanted; that there was nothing really the Cruickshank people were going to do; and that we had just better let it go. So I called for a vote after arguing with Mr. Harrah about it. And I [343] voted aye, and Mr. Harrah voted nay. Mr. Kinney wasn't there.

Q. Did you at a later time talk to Mr. Kinney regarding it?

A. I talked to Mr. Kinney a number of times in regard to the contract.

Q. And what did Mr. Kinney say?

A. He said that he thought we could get the contract for \$10,000 any time he wanted to. He said that he had talked to John Harrah about the thing, and that John didn't feel it was very important. He thought there was

(Testimony of Alfred Arthur Newton)

nothing really practical that the sprinkler people could do.

Q. Now did you at any later time discuss with Mr. Harrah an offer to sell to Mr. Harrah the sprinkling system contract?

A. I think that we had a conversation—I think that I had a conversation with him shortly after the conversation in March that I talked to Mr. Carleton Kinney.

Q. That was in March of 1943?

A. No, it was in March of 1944. It was, let me see—it was—no, it was later than March.

Q. Well, now, let us go back to your 1943 meeting. Did you have a conference after the 1943 meeting at which Mr. Carleton Kinney was not present?

A. Yes.

Q. Did you then have a meeting with Mr. Carleton Kinney in regard to the Cruickshank Company contract?

A. Let me see if I get your question: Do you mean after [344] John Harrah voted no at that meeting did I ask to open the thing up again?

Q. No, did you see Mr. Carleton Kinney the next day or any time after that and ask—

A. It was two or three days before I saw Mr. Carleton Kinney.

Q. What happened at that time?

A. He said he thought—John did—there was nothing the Cruickshank people could do, and that we ought to spend our money on taxes and that we could go ahead with it any time we wanted to.

Q. Now calling your attention to the month of June, 1944, did you or did you not at that time present to Mr.

(Testimony of Alfred Arthur Newton)

Harrah and Mr. Kinney the question of purchasing the contract for \$10,000 or any other figure?

A. I discussed it with Mr. Harrah.

Q. About when was that?

A. Well, the end of May you went East.

Q. And when you say "you"—

A. I mean you, Mr. Davis.

Q. Mr. Phil Davis? A. Yes, Mr. Phil Davis.

Q. Do you recall on what matter I went East?

A. Yes, you were on a matter that concerned the company.

Mr. Kitzmiller: It would be immaterial unless it was—

The Witness: Give me a date now. [345]

Mr. Davis: Q. Was it Pacific Airmax?

A. Yes, at that time Apco Manufacturing Company, of which I am one of the engineers and one of the partners, was interested in working out a deal with them. And when you returned from that trip, you telephoned me and said you had seen Mr. Hugh Darling in Washington.

Q. Yes.

Mr. Kitzmiller: Just a minute. We object to any conversation between Mr. Davis and his engineer here, Mr. Newton.

The Referee: All right, get down to your conversation with Mr. Harrah. Tell us when it was.

The Witness: That is just what I am trying to do, your Honor.

The Referee: But let us not ramble around.

Mr. Davis: Q. Go ahead and tell us what you told Mr. Harrah.

(Testimony of Alfred Arthur Newton)

The Referee: He wanted to fix the time now.

Mr. Davis: Pardon?

The Referee: Let him fix the time.

Mr. Davis: Q. About what date was it?

A. Before I had the conversation with Mr. Harrah, I had the conversation with Mr. Gerety; and that was on Tuesday, June 6th.

Q. And where did that conversation take place?

A. That took place in the Abbot Kinney office. [346]

Q. And what was said at that time?

A. I went down to attend the Executive Committee meeting; and there wasn't any Executive Committee meeting. And I asked Eddie where the other Committee members were, and he said that Mr. Carleton Kinney had gone out of town and that Mr. John Harrah had been in in the morning and that there wasn't anything of importance to come up.

Q. Well—

A. And that he had gone out. We discussed the affairs of the company a little while. I said, "Well, I think that we should take action very definitely in regard to the sprinkler contract." I said, "I have had word from Phil that we can still go ahead with that program for \$10,000." I said, "Don't you think that we should do something about it?"

He said, "Well, Mr. John Harrah wasn't for it."

And I said, "Well, Eddie, Mr. Harrah has a lot of confidence in you, I believe; and I want you to help me persuade him." I said, "He is the key one in the situation. It is vital to the company to buy this contract up if we can; and will you help me?"

He said he didn't know if he could do anything.

(Testimony of Alfred Arthur Newton)

I said, "Will you try?"

He said, "Yes."

Then two or three days after that I had a telephone conversation with you in which you said that the—

Q. Just a minute, you can't tell my conversation. Now [347] when did you see Mr. Harrah next, if at all?

A. Then I saw Mr. Harrah—to the best of my recollection it was a Thursday or Friday of that week.

Q. And where did you see him?

A. Well, I think I ran into him in the office. I had been looking for him.

Q. And who was present at that time?

A. Oh, the office had its usual complement. I think Gale was there, and I don't remember whether Carleton was wandering in and out or not. I think he was. I think the stenographer was there.

Q. Where did this conversation take place, the inner office or the outer office?

A. The outer office.

Q. What was said at that time?

A. I said, "John, I have heard from Phil Davis; and it's vital for you to take action on the sprinkler contract one way or another. He has got this option, and the option is going to be wound up; and he wants to know what we are going to do. I promised to get hold of you and find out what you would do about it." I said, "I am in favor of our making an arrangement to buy the contract."

And he said, "Well, Al," he says, "I don't think that it is necessary to do it." He says, "The only thing they could do would be to take the pipe out"; and he said, "I don't think the pipe is worth the cost of the labor to take

(Testimony of Alfred Arthur Newton)

it out.” And [348] he said, “I don’t think we are really financially able to do it now. There are other things we ought to do”; and he says, “I don’t think anything is going to happen. I think that you will be able to get the contract any time you want to. Nobody is going to buy that old contract.” And he says, “After all, the only thing that could happen would be trouble about our insurance; and the only people that are really interested in that, so far as we are concerned, are the California Bank; and I don’t care what the California Bank wants.”

I said, “Then you feel that we can’t and you won’t do it?”

And he said, “Yes.”

Q. Now did you later have a conversation with Carleton Kinney regarding it?

A. No, because in the two conversations that I had had prior to that time with Mr. Carleton Kinney he had said that he was—believed, as John did, that that was the situation, that we couldn’t buy it up at that time, and that it didn’t matter whether we did or not. There was nothing the Cruickshank people could do that would affect us seriously.

Q. When did you first find out that Charley Brown and Eddie Gerety had purchased the contract?

A. It was several weeks after that.

Q. And who gave you that information?

A. Tom Davis called me in and says—

Q. Tom Davis gave you the information?

A. That’s right. [349]

(Testimony of Alfred Arthur Newton)

Q. Now did you have a conference with Eddie Gerety at that time?

A. Well, I went down to the office; and I said, "Eddie, what about this sprinkler contract?"

Q. What did he say?

A. He says, "Well," he says, "they asked me to go along with them on getting this contract."

And I says, "Well, who is 'they'?"

And he says, "Charley Brown and somebody else."

"Well," I says, "who is the somebody else, Bill Harrah?"

And he said he didn't know.

And I said, "How is it divided up?"

And he said, "Oh, I just have a little piece." He said, "I felt that I had to protect myself; I felt that if I had a piece of the contract and as long as I had a chance to get a piece of the contract it would help protect me."

Q. Did he say anything about the amount of money that had been paid on account of it? A. No.

Q. Was anything said at the time about what had been paid for the contract? A. No.

Q. When did you first learn, if ever, the amount that was actually paid by Mr. Brown and Mr. Gerety for the contract?

A. I don't remember when it was I learned that.

Q. Were you present at the Executive Committee meeting [350] at which the payment of \$7500 was authorized? A. No.

The Referee: Q. Why not? Why weren't you at that meeting?

A. Well, your Honor, I don't know whether there ever was such a meeting.

(Testimony of Alfred Arthur Newton)

Q. Well, you were supposed to meet once a week, were you not?

A. Yes, sir, and I was at most of those meetings; but sometimes the Executive Committee—after the Executive Committee consisted of a bloc of one and two—used to have a little meeting whenever it was convenient and then write it up afterwards.

Mr. Davis: Q. You mean the two would have a meeting when they wanted it and write it up and show that you were not there; is that it?

A. The way the minutes were written up was a series of minutes of what took place would be written up and given a date. And sometimes they met on that date, and sometimes they met on some other date. Then there would be space for three signatures. And if you were absent from the Committee meeting and if you approved what was done, you could sign the minutes.

The Referee: All right, go ahead.

Mr. Davis: Q. Now calling your attention to the payment of \$30,000 upon the sprinkler system contract, when did you [351] first learn about that?

A. Well, I think we learned about the 9th or 10th of November. If I recollect, we had a meeting scheduled for the 8th of November and we didn't know about it until a couple of days later.

Q. Did you talk to Eddie Gerety at all after the payment was made? A. The \$30,000 payment?

Q. Yes. A. Yes.

Q. And what was said, if anything, regarding it?

A. I talked to him on all sorts of matters. I don't remember our discussing the \$30,000.

(Testimony of Alfred Arthur Newton)

Q. You were still on the Executive Committee, were you?

A. Well, if I am correct as to the dates of them—the November 8th meeting—I was on the Executive Committee at the time the \$30,000 was passed and was not at the meeting and not informed of the meeting. And I think, if my recollection is correct, that November 8th was the date the stockholders met and changed the Board of Directors. And after the stockholders met and changed the Board of Directors, the Executive Committee was abolished.

Q. Are you acquainted with Charles Brown?

A. Yes.

Q. How long have you known Charles Brown?

A. Well, of course I have known Mr. Brown for some years— [352] I have known him quite well, I should say, for five or six years.

Q. He was employed by the Abbot Kinney Company at one time, was he? A. Yes.

Q. Are you acquainted with William Harrah?

A. Yes.

Q. How long have you known William Harrah?

A. Well, I have known William Harrah since 1937.

Q. Did you ever have occasion to discuss with Mr. John Harrah a lease upon the so-called Robbins Building?

A. Yes.

Q. When did that conversation take place approximately?

A. Well, there was a great many conversations about that building. The first conversation, I presume that—

(Testimony of Alfred Arthur Newton)

Q. Yes, give me the first conversation you recall?

A. The first conversation, I think, was in the Owl Drug Store at the corner of Windward and the ocean front, when John and I were having lunch and John said—

Mr. Cobb: Just a moment, your Honor. May I have the witness instructed to answer the question? He was asked when he had the first discussion with John Harrah about the Robbins Building.

The Referee: Fix the time?

The Witness: About three months before they granted the lease. [353]

The Referee: Q. When was that?

Mr. Davis: Q. Do you recall that date, Mr. Newton? A. No, I don't.

Q. I wonder if we can get that set. I don't know myself—

Mr. Cobb: Can't he give approximately the year? He was very exact about everything else he wanted to bring out.

Q. Do you know what year it was?

The Referee: Q. Do you know what year it was?

A. It must have been about two years ago.

Q. 1943, you think; after the start of the war?

A. Oh, yes, it was after the start of the war. Let me think, your Honor. Maybe I can think of some local incident that will bring that back.

Mr. Davis: Q. What was said at that time?

Mr. Cobb: To which we object on the ground that the lease on the Robbins Building is immaterial and any conversation had between this witness and John Harrah

(Testimony of Alfred Arthur Newton)

is not binding and is hearsay as to my client, Charles Brown; and unless some relevancy is shown—

The Referee: What is your purpose, Mr. Davis?

Mr. Davis: We intend to show that Mr. John Harrah approached Mr. Newton, who was a member of the Executive Committee and therefore had to consent to any lease, and said that the Robbins Building would make an ideal place for a new Bridge or Bingo game; that Mr. John Harrah had employed [354] Mr. Pool to prosecute this action to the Supreme Court—or that Mr. William Harrah had; and that since Mr. William Harrah had paid for the decision of the Supreme Court in the fight that he ought to be given first consideration on that lease; that Mr. Newton stated he was sympathetic towards the position of Mr. William Harrah and that he would certainly consider it. Thereafter they had several more discussions; and when it finally came down to the final drawing up of the lease, Mr. John Harrah said, "Put it in the name of Charley Brown."

The Referee: Go ahead; the objection is overruled.

Mr. Kitzmiller: Let us get the foundation as to time. That was the last question the witness was asked.

The Referee: Mr. Brown is in the court room.

Mr. Brown, do you know when that lease was executed?

Mr. Brown: I think it was in October of 1943.

The Referee: That is your best recollection?

Mr. Brown: I think it was in October of '43.

The Referee: All right.

Mr. Brown: May I just add a word there?

The Referee: No, we will get to you later.

(Testimony of Alfred Arthur Newton)

The Witness: Your Honor, may I find out if Mr. Brown is referring to the lease that was finally executed or the lease that was originally executed?

Mr. Davis: Mr. Brown, was that the lease that was originally executed with Robbins or that you finally signed? [355]

Mr. Brown: When I first discussed it, I talked it over with Mr. Gerety and said I would like to have a lease on the building and at that time—the building was unoccupied for quite a few years.

Mr. Heap: Just a minute—

Mr. Davis: I will have to get those dates, your Honor.

The Referee: You have got to be prepared, Mr. Davis.

Mr. Heap: May the record show that the last question by Mr. Davis was directed to Mr. Charles Brown in the back of the room, and that the answer came from Mr. Brown as far as it came.

The Referee: All that may go out. Let us see if Mr. Newton could tell us the date approximately, what year it was in.

The Witness: Your Honor, I would say it was about three months prior to October, 1943, that this discussion I am talking about took place.

The Referee: Proceed.

Mr. Davis: Q. Who was present at that time?

A. Just myself and Mr. Harrah.

Q. And what was said?

A. Well, Mr. Harrah said that Bill had put up the money and had done all the work to win the suit, and that we wanted to open up the Tango on a larger scale,

(Testimony of Alfred Arthur Newton)

and that he thought that Bill deserved it. I said I sympathized with Bill's efforts to open up the Tango, and that I thought it was a [356] good thing but that I thought the Robbins boys, who only had a tentative arrangement, must be considered; that I didn't want to have two Tangos when they were first opening up, because I didn't think two Tangos was enough business; and that if they got in a fight between Tangos, it would be bad; and that if there was to be any arrangement it must be worked out with the Robbins boys. So then nothing further was said, and Mr. Harrah saw me a few days later or a week or ten days later and said that Bill was going to go ahead and have Charley Brown take the thing over.

And I says well, that I was not particularly interested in giving Charley Brown the lease, but that as long as Bill would be responsible for Charley Brown he could have it that way if he wanted to.

He said yes.

And I says, "Have you straightened it out with the Robbins boys?"

He said well, that Charley Brown would straighten it out with the Robbins boys. One of the boys came down to see me. I think they finally arrived at some program with Mr. Brown about it.

Q. Thereafter a lease was executed in the name of Charley Brown?

A. No, the lease was originally executed—they worked out a matter to have Robbins to continue to take the lease. The lease was executed in the name of Mr. Brown.
[357]

(Testimony of Alfred Arthur Newton)

Q. And Mr. Brown has supposedly continued operating it ever since? A. Supposedly.

Q. Did you have any other conversations with Mr. Harrah regarding any other lease down there which would be in the name of Charley Brown?

A. Well, the Dragon Slide lease came to an end. I think that the ending of that lease was—well, it had been hanging fire for a couple of months. But the time I alluded to was in June, I think, of '42, I think it was.

Q. Yes.

A. And we were questioning whether we would renew the lease to the old lessees, and we concluded that we weren't getting enough out of it.

Q. You and Mr. Harrah did this?

A. Yes. We all were in agreement that we weren't getting enough rent. And I think I was the one to move that the lease be canceled and that the people be given their papers to get out. And I suggested that the company take over the operations of the Dragon Slide itself.

And Mr. Harrah said, "Well, whom would we get to run it?"

I said, "Well, we have all got a lot of confidence in Charley Brown's ability. Why not give him a step up and make him not only rent collector but put him in charge of the Dragon Slide? We ought to be able to pay a good salary for doing that, and he is a good man." [358]

John said he was a good man, all right, but he didn't think he would want to do it.

(Testimony of Alfred Arthur Newton)

I said, "Oh, well, John, you have got plenty of influence with Charley Brown. You persuade him to do it." I said, "At any rate you have a talk with him about it and see if he won't go ahead."

Then I left the meeting and went down to Mexico.

Q. What happened when you came back?

A. When I came back, I found that they had rented the Dragon Slide to Mr. Brown instead of putting him in as manager.

Q. And the rental was—how close was that to the other rental that had been paid?

A. The rental was much better.

Mr. Cobb: We move that answer be stricken.

The Referee: I don't understand that.

Q. What do you mean by "much better?"

A. It was 30 per cent instead of 20.

Q. You mean that the company got 30 per cent instead of 20 per cent?

A. Yes.

(A short recess.)

Mr. Davis: If your Honor please, Mr. Lou Halper is here. Counsel have indicated that they have no objection if we put Mr. Halper on out of turn, and that they will cross examine Mr. Newton after we finish with Mr. Halper. Mr. Halper is a [359] very busy man; and if he could be accommodated, he would appreciate it very much.

The Referee: Very well. Come forward, please, Mr. Halper.

LOUIS HALPER,

called as a witness on behalf of the petitioning creditors,
being first duly sworn, testified as follows:

The Referee: Q. What is your name?

A. Louis Halper.

The Referee: Go ahead, gentlemen.

Direct Examination

By Mr. Davis:

Q. What is your business?

A. Building contractor.

Q. How long have you been in that business?

A. Oh, a little over 25 years.

Q. Are you a director of the Abbot Kinney Company?
A. Yes, sir.

Q. How long have you been a director of the Abbot Kinney Company?

A. I think since some time in 1938 or 1939; I wouldn't recall exactly.

Q. Did you go on at the same time Mr. John Harrah went on? [360]
A. Yes.

Q. And Mr. Al. Newton?
A. Yes.

Q. Have you served as a director ever since that time?

A. I have.

Q. Are you acquainted with John Harrah?

A. Yes, sir.

Q. How long have you known John Harrah?

A. Oh, since the early thirties, say 1931 or 1932.

Q. Are you related to Eddie Robbins?

A. Yes, sir.

Q. What relation are you of Eddie Robbins?

A. He is my brother-in-law.

(Testimony of Louis Halper)

Q. Is Eddie Robbins the one that signed the agreement of December 23, 1937, the so-called bond pool agreement? A. Can I see it?

Mr. Kitzmiller: We stipulate that—

Mr. Davis: That (indicating) is the bond pool agreement, and that is the date. Your answer is yes?

A. Yes.

Q. Now, Mr. Halper, did you have any bonds personally of the Abbot Kinney Company?

A. No, sir.

Q. The bonds that were represented in there were those of your brother-in-law? A. Ed. Robbins.
[361]

Q. During all the time, however, you have represented the interests of Ed Robbins in the Abbot Kinney Company?

A. That's right. He being out of the state, I looked after it from its very inception.

Q. You formed a bond pool with John Harrah, William Harrah, Frank Williams?

A. J. F. Williams.

Q. J. F. Williams—and Eddie Robbins?

A. That's right.

Q. And that bond pool owned in the first instance \$136,000 worth of bonds?

A. Approximately that.

Q. Did you become well acquainted with John Harrah as the result of your relationship in that bond pool?

A. Yes, I did.

(Testimony of Louis Halper)

Q. When did you first become acquainted with Hugh Darling?

A. I think some three or four or five weeks prior to the execution of that bond pool.

Q. And what was the occasion of that meeting?

A. He was representing—oh, I don't remember the name of the company, but Red West is the way we always referred to him.

Q. The Cruickshank Company?

A. The Cruickshank Company, that's right. And Red West at that time attempted to purchase all of our bonds; namely, Robbins, Harrah, and J. F. Williams'. [362]

Q. Did you have any arrangements in that bond pool as to what each of you would do in regard to any other bonds or assets of the Abbot Kinney Company which you might acquire?

Mr. Cobb: To which we object on the ground that it is too remote and if it was reduced to writing, the writing is the best evidence, and if it was not reduced to writing it violates the statutes of fraud.

The Referee: I don't think it was reduced to writing.

Mr. Kitzmiller: What is the materiality—

Mr. Davis: Well, I will withdraw the question. I think if we get down to a later date it would be better.

Q. Calling your attention particularly to the F. R. Cruickshank Company contract, do you recall whether or not any demand was ever made upon Abbot Kinney Company by F. R. Cruickshank Company for its payment?

A. There was never a demand made. I think there was some demands made when Hugh Darling was on the Board of Directors; and every time we had a meeting, he

(Testimony of Louis Halper)

said something about "When are we going to get the money?" But since Hugh Darling has been off of the directorate, there has never been any demand made orally or in writing from Hugh Darling or West, so far as I know.

Q. Were there any discussions, Mr. Halper, at the Board of Directors' meetings regarding the value of that Cruickshank Company contract so far as its payment by Abbot Kinney Company?

A. Yes, there was a number of discussions so far as the [363] payments by the Abbot Kinney Company. I was always—

Mr. Cobb: We object on the ground that—until a foundation is laid.

The Referee: Go ahead.

Mr. Davis: Q. When did those discussions take place?

A. At the different Directors' meetings.

Q. Who was present at those meetings?

A. Well, it's rather difficult to remember everybody that was present, because at some times some of the directors were absent and sometimes they were all there.

Q. The ones you had in mind, state whether or not John Harrah was present?

A. John Harrah was present at almost every meeting, I think every meeting I was there.

Q. That covered all the meetings of the Board of Directors?

A. That's right.

Q. What was said in those meetings in relation to the Abbot Kinney Company, Cruickshank Company contract?

(Testimony of Louis Halper)

Mr. Cobb: To which we object on the ground that it is hearsay as far as respondent Brown is concerned.

The Referee: Overruled.

Mr. Davis: Q. Go ahead and answer, Mr. Halper.

A. You and Tom always wanted the Abbot Kinney Company to purchase that contract. I for one very strenuously objected, because I said from our point of view; namely the bondholders,' [364] the contract was valueless because in a foreclosure it would automatically wipe it out.

Q. What did Mr. Harrah say, if anything, about that?

A. Mr. Harrah agreed with me, with me thoroughly. He and I were always in accord in so far as the Cruickshank Company contract because of our bond position. We were the first lien holders, and Cruickshank was behind us.

Q. At that time were there substantial taxes due on the property also?

A. Yes, there was—well, during this period I would say there was in excess of, oh, \$80,000 in taxes, which from time to time we put on a five-year basis.

Q. Now did you ever have a discussion with Mr. John Harrah about the possible purchase of the Cruickshank Company contract?

A. Yes, we discussed it on a number of occasions.

Q. When was the first occasion as you recall it now?

A. I couldn't recall it because it's over a period of years and that Cruickshank Company contract came up from time to time.

Q. What was said, as you recall, in the first conversation?

A. Well, we disagreed with yours and Tom's theory of attempting to buy the contract, because, as I said, we

(Testimony of Louis Halper)

always took the position that the contract was valueless from our point of view since we were the first lien holders. Mr. [365] Harrah and I were always in accord on that theory; there was no question about that.

Q. Mr. Harrah always said that you should not buy it?
A. That's right, yes.

Q. Now did you have a conversation—state whether or not you had a conversation with Mr. Harrah just about January 8, 1943, over the telephone at which time Mr. Harrah stated that Al. Newton was suggesting that the company should buy the contract for \$10,000. It was in January of 1943?

A. I don't remember the dates exactly. I wouldn't know whether it was January of 1943 or February or March. But the conversation I think that you refer to had occurred on a number of occasions in that particular time, because there was always you and Tom and Al. Newton who were always pressing the purchase of that contract from Red West. John Harrah and I always took the stand that we didn't want it. And any time we discussed it on the telephone, it was along these particular lines.

Q. Now getting down to a time just prior to the purchase of the contract by Charles Brown, did you have a conversation with Mr. Harrah about that time?

A. Let's see if I can understand—

Q. Just prior to the time that Mr. Brown purchased it, as you have later found out the date?

A. I didn't know that Brown purchased it until John Harrah told me at a conference in his office between Mr. [366] Williams, yourself, John Harrah, and myself.

(Testimony of Louis Halper)

Q. When did that take place?

A. It took place on a Saturday. Now as the dates I couldn't possibly remember what date it was. But I know that it took place on a Saturday afternoon.

Q. What was the occasion for that meeting?

A. The occasion for that meeting was that Mr. Cradick, Mr. Williams' attorney, had drawn an agreement where the bondholders were to sign—I think the Davis group—to elect Mr. Williams on the Board of Directors and you, Philip Davis, on the Board of Directors. And an agreement was drawn as per our understanding in a conversation prior thereto. Mr. Williams and I took that agreement in for John to sign. We went over that agreement, and John found that he didn't like the phraseology of the agreement. So he wrote it in in ink what it should be. I have a copy of it some place. I don't know whether I can find it or not. And then he said he would have it redrawn in accordance with the correction in the phraseology and send it to Bill to execute. And during that conversation we were informed; that is, Mr. Williams and I—

Q. What did Mr. Harrah say?

A. Oh, after we had agreed on the phraseology of the agreement for the purpose of him sending it to Bill, Williams then referred to the sprinkling contract, whereupon John said, "Oh, we have already bought it."

I says, "Just what do you mean?" [367]

He says, "Well, Charley Brown has an interest and Eddie Gerety has an interest."

And I said, "Well, that's a very fine thing to do."

(Testimony of Louis Halper)

I was rather taken aback and surprised, because just some week or ten days prior, when you called me up and accused John Harrah of trying to buy the contract, I called you all kinds of names I wouldn't want to mention here.

Q. That was before the contract was bought?

A. Yes. And I was taken aback. I says, "What do you mean, you bought it?"

He says, "Well, we got the contract."

And it was all quiet for a moment, because we were so definitely surprised. Finally John says, "But I wouldn't worry about it. You can have whatever portion of it you want up to the portion you are justly entitled to in accordance with the pro rata share of the bonds." And he says, "They've already paid \$7500."

I said, "What for?"

He said, "Well, Mr. Brown threatened to shut the water off."

I says, "That seems silly to me that in all these years Cruickshank threatened to shut the water off, and all of a sudden Brown comes in and threatens to shut it off and you pay \$7500, and that money could have gone to pay both interest and penalties."

So he says, "Well, it would increase the insurance."
[368]

I says, "Well, so far as I am concerned I don't believe I am going to want any of this thing. This thing is full of dynamite."

We left there and went out; and Mr. Williams and I ran into Cradick on the corner of Windward and Ocean Front. And Cradick was representing Williams. He told Cradick—

(Testimony of Louis Halper)

Mr. Kitzmiller: No conversation with Cradick, please.

Mr. Davis: Q. Wasn't Mr. Cradick also representing Mr. Harrah during part of this time?

Mr. Cobb: To which we object on the ground that it calls for the conclusion of the witness and that no foundation has been laid. It is hearsay.

Mr. Davis: Q. Do you know of your own knowledge whether Mr. Cradick was also representing Mr. John Harrah in these bonds arrangements?

A. Well, the meetings that Harrah, Williams, and myself had in Cradick's office—whether he was actually representing him or not, I don't know; but he was looking after the interests of the entire bond pool.

Q. Eddie Robbins' as well as John Harrah's and Frank Williams'? A. Yes.

Q. What was said in that conversation?

Mr. Kitzmiller: I object to that on the ground that it is hearsay.

The Referee: Why do you think you have laid a foundation, [369] Mr. Davis?

Mr. Davis: Well, so far as John Harrah is concerned—

The Referee: How?

Mr. Davis: So far as John Harrah was concerned, your Honor, he was representing him in these bond pool—

The Referee: Who was?

Mr. Davis: Cradick.

The Referee: On the testimony of this gentleman?

Mr. Davis: After all, he said he was in these meetings.

(Testimony of Louis Halper)

The Referee: That is a rather odd way to prove agency by the testimony of a third party. The objection is sustained.

Mr. Davis: Q. When did you first learn that the \$30,000 had been paid?

A. If I could get the date of the stockholders' meeting—

Mr. Kitzmiller: November 8th.

The Witness: November 8th. I think I learned, oh, maybe a week or several days thereafter. I remember that very distinctly, because I jumped right down your throat by saying I demanded the checking account be canceled until such time as the new Board of Directors was in, to write the bank a letter telling them—you said that you couldn't do that. Then we found that the \$30,000 had been paid.

Mr. Davis: I think that is all.

The Referee: Cross examine?

Mr. Cobb: Yes, your Honor. [370]

Cross-Examination

By Mr. Cobb:

Q. Mr. Halper, Mr. Brown was not present when you had this conversation with Mr. Harrah?

A. No, he was not present. But he came in during the conversation and didn't stay very long. Merely asked Harrah for the key and went over to the safe, took out some money, and walked out. I don't believe that lasted over, I should say, three minutes.

(Testimony of Louis Halper)

Q. And this conversation you have related between you and Mr. Williams and Mr. Harrah, did that occur before or after Mr. Brown left?

A. During the conversation.

Q. Well, he came in during the conversation?

A. Yes, during the conversation.

Q. But he did not enter into the conversation, did he?

A. No, sir; no, sir.

Q. And in reference to Mr. Harrah's saying that he had acquired the contract, did you ask Mr. Harrah how much he had paid on it?

A. Well, he said that "We paid" or he may have said "Bill" or—he always refers to Bill Harrah in these dealings, and it rather confuses me whether it is he or Bill.

Q. He uses the term "he" in connection with William Harrah?

A. That's right. [371]

Q. Now he told you, did he not, that the corporation did not buy the contract?

A. Oh, yes.

Q. And how much did he say was paid for the contract?

A. \$15,000.

Q. Now just prior to that you had been requested to contact Mr. Darling and ascertain what the contract could be bought for?

A. I did.

Q. And you offered Mr. Darling \$12,500?

A. No, I didn't offer Mr. Darling \$12,500. I called Mr. Darling—on this particular occasion—the reason I called Mr. Darling, Mr. Davis called me and accused me of buying the contract. And when I assured him it wasn't so, he said, "It must be John Harrah."

(Testimony of Louis Halper)

I says, "No, it couldn't be John Harrah, because if he would attempt to buy the contract he would certainly tell me about it."

So I called Hugh Darling to find out. I never made him any offer. But Hugh Darling then told me that until such time as his promise to the Davises had expired, which had perhaps another few days to go, he couldn't discuss the contract with anybody.

Q. You had contacted Mr. Darling prior to that time and tried to get an offer out of him as to what the contract could be purchased for, had you not? [372]

A. Yes, I think I did.

Q. And you offered him \$12,500, and he told you he wasn't interested?

A. No, that wasn't it at all. There was no dickering or offering, because he told me that the Davises had it tied up so far as he was concerned for \$10,000.

Q. And when you talked to him and he told you the Davises had it tied up, you understood that the Davises were interested in acquiring it for the stockholders or the interests they represented?

A. No, they were interested in acquiring it for the corporation. There is no question about that.

Q. Now you stated at different times here you were opposed to the corporation's acquiring the contract?

A. That's right.

Q. And that you and John Harrah saw eye to eye on that? A. That's right.

Q. And that was always your position, as I understand it?

A. That was always my position, yes, sir.

(Testimony of Louis Halper)

Q. And the reason for that was that your bonds were a prior lien to the assets down there, over any deficiency claim that might exist under this contract?

A. It was always my understanding, and I think rightly so, that on a foreclosure of a first lien it wipes out anything behind it.

Q. And that is the reason you were not in favor of [373] paying any money on this contract?

A. That's right.

Q. So you, as a director, did not feel the contract had any value to the Abbot Kinney Company?

A. I felt—no, I was talking of my personal point. I never took the—in so far as the contract itself was concerned, in view of the agreement, I felt that the Abbot Kinney Company would benefit by it the same as the bondholders in the event of a foreclosure.

Q. At any time prior to the time that you learned Charley Brown had purchased the contract you were not in favor of the Executive Committee or any officer's buying the Cruickshank contract; is that your testimony?

A. Well, "any time"? No, I didn't testify that Charley Brown bought it.

Q. Well, you know about when he purchased it—any time prior to June 13th, 1944, were you in favor of the Executive Committee or the Abbot Kinney Company's purchasing this conditional sales contract?

A. No, I wasn't in favor of them purchasing the conditional sales contract any more than I was in favor of them paying the \$7500 or the \$30,000.

Q. Now on the payment of the \$7500 you just objected to using money of the company to pay anybody

(Testimony of Louis Halper)

other than something that would benefit the bondholders; was that your position?

A. No, I objected to that \$7500 being paid because Mr. [374] Harrah enjoyed a position of trust as one of the Executive Committee, together with his cohort Mr. Kinney, and took advantage of the situation.

Q. Now as far as you as director were concerned, you instructed the Executive Committee what your pleasure was in the matter prior to June, 1944?

A. That isn't so. We attempted on a number of occasions to eliminate the Executive Committee, because they weren't operating for the benefit of the Abbot Kinney Company. We couldn't get a quorum together.

Q. You mean you couldn't get a quorum of the Abbot Kinney Company together? A. No, sir.

Q. Are you interested in any business down there owned by the Abbot Kinney Company?

A. No, sir.

Q. Mr. Robbins is interested in some—

A. Mr. Robbins is interested; but so far as I am concerned, I don't have one penny's financial interest in any of Mr. Robbins' business down there.

Q. Mr. Robbins owns no business down there?

A. He doesn't own any business down there. He merely rents his fixtures—if I understand you correctly. That is now in the Robbins Building that they had originally constructed.

Q. What businesses are operated by Mr. Robbins?
[375]

A. On the Abbot Kinney pier? None whatever.

(Testimony of Louis Halper)

Q. And they have some property they rent; is that right?

A. No, they did not ever rent. That was arranged for by the Executive Committee. Robbins had the lease, and finally he woke up without a lease and Mr. Harrah had it—or Mr. Brown.

Q. When did that occur?

A. I think it was some time in 1943.

Q. And did you become bitter toward Mr. Brown when that occurred? A. Did I what?

Q. Did you become bitter?

A. Oh, God, no!

Q. That did not displease you or you did not feel any animosity toward—

A. Oh, no, I am not bitter. I would like to correct that. There is nothing bitter or vindictive about it.

Q. Did you have anything to say to Mr. Brown or Harrah when Robbins lost the lease down there?

A. No, because Mr. Brown and Harrah had made arrangements satisfactory to Mr. Robbins, and there was no reason for me to be bitter or resent anything they did. Robbins is perfectly happy; and if he is, I am.

Q. Mr. Brown then negotiated with Mr. Robbins and made a satisfactory deal with him before taking the fixtures over; is that what occurred? [376]

A. Yes, I think that is what occurred.

Q. Did you receive a copy of a letter from the Cruickshank people in New York on or about the 9th of June, 1944, wherein they were threatening to cut off the water?

A. In June, 1944?

Mr. Davis: Might I just show it to him?

Mr. Cobb: Yes.

(Testimony of Louis Halper)

The Witness: I never saw this letter before.

Mr. Cobb: Q. Now this conversation you had where Mr. Williams and Mr. Harrah and yourself were present, in the office of the Abbot Kinney company, was that after the \$30,000 had been paid?

Mr. Davis: Just a moment. I think that you made a mistake as to where it was held. He said in John Harrah's office, as I recall.

Mr. Kitzmiller: I believe he said John Harrah's office.

Mr. Cobb: I will correct that. The conversation you had with Mr. Harrah and Mr. Williams, when did that occur?

A. That occurred on a Saturday afternoon. I wouldn't know the date. It was prior—if I had the date of the stockholders' meeting, I could tell you.

Mr. Kitzmiller: It was November 8th.

Mr. Davis: November 8th.

Mr. Cobb: Q. Was it after that? A. No.

Q. Prior to that? [377] A. Yes.

Q. How long?

A. Oh, it may have been a week or two. I wouldn't recall exactly.

Q. Some time in November? A. Yes.

Q. Did Mr. Harrah, when he spoke about William Harrah and himself, did he say how much interest that he had in the Brown contract or the Cruickshank contract? A. No, he said he controlled it.

Q. Did he say he had a third interest?

A. No, he didn't talk of any interest. He controlled it, and he said that Mr. Williams and myself could have

(Testimony of Louis Halper)

whatever we desired up to our portion of the share of the bonds.

Q. How much did you figure—

A. Mr. Williams has 50 per cent, Mr. Harrah has 25 and Mr. Robbins has 25. Therefore it would be—

Q. Did he tell you how much it would cost you?

A. Yes, he told me it would cost \$15,000.

Q. And you were talking about acquiring a half interest?

A. No, we weren't talking about the acquisition of a half interest. He merely told us, and I said it was full of dynamite, I wouldn't have it.

Q. You said you owned 50 per cent of the bonds, did you not?

A. No, Mr. Williams owned 50 per cent, Harrah 25 per cent, [378] Robbins 25 per cent. Therefore if we had taken our proportionate share according to his offer, Mr. Williams would have had 50 per cent, Mr. Robbins 25, and Mr. Harrah 25.

Mr. Kitzmiller: Can we have this understood, that when we are talking about 50, 25, and 25, that is the bond pool?

The Witness: Of the money in the bond pool.

Mr. Cobb: Q. And you were not interested on behalf of the bondholders in acquiring this contract because you thought your bonds were ahead of it?

A. That's right.

Q. Did you tell Mr. Harrah that was your position?

A. No.

Q. Did you tell him you had changed your position?

A. I didn't tell him anything. That was never brought up.

(Testimony of Louis Halper)

Q. Why did you contact Mr. Darling about buying this conditional sales contract if you were not interested?

A. Well, the Darling incident is as follows: Mr. Darling had contacted me on maybe 50 occasions throughout these years for me to use my influence to have Mr. Williams buy.

Q. To buy what?

A. The contract. And it started up 'way up to \$20,000 and finally got down to zero. The reason I called Hugh Darling and tried to get the information was for the purpose of checking up as to what was going on, because I was hearing stories [379] from Phil Davis and from Tom Davis and I just wanted to know what was going on. Tom Davis had called and first accused me of attempting to buy the contract and then accused Harrah. So I called Hugh Darling purely for the purpose of investigating and to satisfy myself, never intending to buy it because I—had I called Mr. Darling for the purpose of buying it, it would have been for the benefit of the corporation and not myself.

Q. But you were not interested in the corporation's buying it?

A. That's right.

Q. You did not want the corporation to buy it?

A. That's right.

Mr. Cobb: That is all.

The Referee: Are there any other questions on cross examination?

Mr. Kitzmiller: Yes, your Honor.

The Referee: Proceed.

(Testimony of Louis Halper)

Cross-Examination

By Mr. Kitzmiller:

Q. Now you speak of the Davis group's being interested as stockholders and your being interested as a bondholder. Is it not a fact that the Davises have an interest in the bonds as well as in the stock?

A. I prefer not to commit myself there, because there is [380] a legal question—there is a question there.

Q. I will reframe the question: You have testified to this bond pool agreement; and, without going into that at all but coming to a later date, say, last year some time, wasn't there some sort of a tentative agreement drawn up which was finally never executed and whereby the Davises were to participate in the bonds to the extent of 25 per cent—and I am not referring to the bond pool agreement? A. Yes.

Mr. Davis: Just a moment. I object to that on the ground that it is incompetent, irrelevant, and immaterial and has no bearing on the case at all. The contract was never executed.

The Referee: Sustained. Proceed.

Mr. Kitzmiller: Q. Now do you know what year it was you talked to Mr. Darling?

A. Oh, over a period of years.

Q. Over a period of years? A. Yes.

Q. Do you know whether or not it was in 1943 or 1944 when he allegedly told you that the contract could be acquired for \$10,000 or that the Davises had an option for \$10,000? A. That's right.

(Testimony of Louis Halper)

Q. That was in 1944?

A. He said he had given the Davises his word. It was then—let's see, I think it was some time in 1944.
[381]

Q. And you never talked to Mr. Darling at all about buying the contract for yourself and Mr. Williams?

A. Well, no, I have never talked to him with that intention. Every time I talked—the last time I talked with him was for the purpose of getting information. But there was never any intent—

Q. Well, in these conversations that you had with Mr. Darling which you say was for the purpose of getting information, did you make the statement to him that you were interested in buying the—

A. Yes, yes, I certainly did. I talked with him as if we were interested in the purchase of it.

Q. And was any price ever discussed?

A. Yes, price was discussed. He thought if I would put in an offer, after the expiration of his promise to Davis, of \$12,500, he thought he could put it over.

Q. After his offer to Davis of \$12,500?

A. No, after his promise to the Davises—from what he told me, he had made a promise to the Davises that they had up to a certain time to come up with \$10,000. If they didn't come up with it and if I made him a cash offer of \$12,500, he thought he could put it over with

(Testimony of Louis Halper)

Red West. But in no event would he commit himself until his agreement had expired with the Davises.

Q. And you don't know what month that was in 1944?

A. Oh, God, no, I couldn't if my life depended on it, [382] remember exactly what day or month or—

Q. Did you ever have the feeling that the Davises were trying to purchase this contract for themselves rather than, as you stated, for the corporation?

A. No.

Q. Did you express yourself at any time to the effect that the Davises were trying to acquire this for themselves?

A. I don't think so. I never had any reason to, because Phil Davis had always called me, and so did Tom, insisting that we buy it.

Q. Always—I didn't hear the last.

A. Insisting that we buy it.

Q. And do you know whether or not they had an option on the contract in 1943, the Davises?

A. I don't know how long their option—when they got their option; but, as I said, Mr. Darling told me that he had given them his word—never an option; it was always that he had given them his word—they had until a specific time in which to purchase it.

Q. Did Mr. Darling tell you in these conversations that they were attempting; that is, the Davises were at-

(Testimony of Louis Halper)

tempting, to buy the contract for the corporation or for themselves?

Mr. Davis: I object to that, your Honor.

The Referee: I will have to sustain it. It makes no difference, gentlemen, whether the Davises were out to defraud this company or not. The Davises are not on trial; and even if [383] they had defrauded the company, that would not excuse any one else for what they might have done. Proceed.

Mr. Kitzmiller: Q. Did you ever have a discussion with Mr. Williams with regard to purchasing the contract for yourselves, you and Mr. Williams?

Mr. Davis: Oh, I object to that, your Honor.

Mr. Kitzmiller: Q. Well, I would rather not lay the foundation as to time and place; but I am just asking you if you had such—

Mr. Davis: I object on the ground that it is incompetent, irrelevant, and immaterial; that no proper foundation has been laid—

The Referee: Sustained on the first ground, that it is incompetent, irrelevant, and immaterial.

Mr. Kitzmiller: Q. I call your attention to some time in May of 1944. Do you remember being in my office with Mr. Williams at that time? A. Yes.

Q. Do you remember at that time discussing—I am sure this is not—if you think anything that was said there in regard to this particular thing was confidential,

(Testimony of Louis Halper)

please advise me and we will not go into it—as I recollect, we were discussing this pooling agreement.

A. The possibility of breaking it?

Q. Yes. A. That's right. [384]

Q. And not discussing anything about this contract that was— A. I remember that very distinctly.

Q. And do you recall at that time that you and Mr. Williams had a conversation with regard to purchasing the contract and that you called Mr. Darling—I believe it was you or Mr. Williams that called Mr. Darling from my office—

A. That may have happened. But tell me a little bit more to refresh my memory.

The Referee: After all, counsel, this Court cannot sit here and listen to this irrelevant matter. I have already ruled that it does not make any difference who tried to buy this contract, Williams or Davis or anybody else.

Mr. Kitzmiller: All right, your Honor, I withdraw the question.

The Referee: Is there any other cross examination? Is there any redirect examination?

(No answer.)

May Mr. Halper be excused?

Mr. Kitzmiller: Yes, your Honor.

The Referee: Court is adjourned until 2 o'clock. All other witnesses are instructed to return at that time. [385]

2:00 O'Clock, P. M., Session.

The Referee: Have we any witnesses?

Mr. Davis: No, we do not have as yet. Mr. Newton and Mr. Mapes both promised that they would be in my office around 1 o'clock and they did not show up there, and he was supposed to have gotten certain information. I called out, and Mr. Mapes had not even called. But I anticipate they will be here shortly.

The Referee: Well, you all ought to do what the Court does. The Court does not ride street cars; it walks.

Mr. Davis: Might I be excused during this delay, your Honor?

The Referee: By all means.

(A short recess.)

Mr. Newton: Your Honor, I got caught in traffic; and I apologize to the Court.

The Referee: That is all right. This is Mr. Newton. He has been sworn. Is there any more direct examination?

Mr. Davis: I think that I was through, your Honor.

The Referee: Who wishes to cross examine?

Mr. Cobb: I have some questions, your Honor. [386]

ALFRED ARTHUR NEWTON,

recalled for

Cross-Examination

By Mr. Cobb:

Q. Mr. Newton, you became a member of the Executive Committee about what date?

A. When it was created. I don't remember the date it was first created.

(Testimony of Alfred Arthur Newton)

Q. And at the time it was created they set Tuesday of each week for a meeting?

A. I think that the Committee when it was constituted chose its own date of meeting. Sometimes it met on a Tuesday because that was right after the Chamber of Commerce, and sometimes it met on a Wednesday because it suited Carleton Kinney better; and other times it changed over.

Q. During the year 1944 Tuesday was the agreed date, was it not? A. That's as I recollect.

Q. Where were you employed in 1944?

A. In 1944 I was night superintendent of the Apco Manufacturing Company.

Q. And is Mr. Davis or the Davis group associated with you in that?

A. We are all associated together in that enterprise.

Q. And that is Moses Davis and W. Thomas Davis and Philip Davis? [387]

A. Thomas Davis and Philip Davis are directly interested in that. I don't know whether Mr. Moses Davis is a member of that or one of its subsidiaries.

Q. He is the father of Philip and W. Thomas.

A. Yes, I know, sir.

Q. And when this pooling agreement was made in connection with the bond indenture, were you at that time associated with the Davises? A. No.

Q. Did you personally own any stocks or bonds of the Abbot Kinney Company? A. When?

Q. When the pooling agreement was formed?

A. At the time the pooling agreement—you mean the original 1937 pooling agreement?

(Testimony of Alfred Arthur Newton)

Q. Yes.

A. At that time I held in my name 44,000 shares and had under contract from Sherwood Kinney 9,000 shares more, I think it was, of the stock of the Abbot Kinney Company.

Q. Did you own the 40,000 shares, not what you had in your name?

A. Yes, I owned the 40,000 shares subject to a previous contract with them.

Q. And from whom did you acquire your stock?

A. I acquired my stock—you want me to recite all the different individuals? [388]

Q. Well, did you purchase the stock; or was it put in your name to handle for a group?

A. No, I acquired the stock as the result of a contract under which I prevented the company from being foreclosed.

Mr. Davis: I object, your Honor, on the ground that it is incompetent, irrelevant, and immaterial. I don't know why we are going back to that.

The Referee: I think we have a right to know what this gentleman's connections are with the company, and to a certain extent at least, how he acquired those connections.

Q. Tell us as briefly as you can.

A. Yes, your Honor.

Q. All right?

A. In 1929 Sherwood Kinney hired me for a brief time to write a report on the beach development possibilities for Venice. I got to know Mr. Sherwood Kinney very well. And I foresaw the possibilities of mak-

(Testimony of Alfred Arthur Newton)

ing a tremendous beach development program through Venice and through there. And Mr. Sherwood Kinney and I became very intimate friends. I was already an intimate friend of Mr. Gerety, and they had great confidence in me and I in them. And we worked intensively, very, very hard, on the program to develop a magnificent beach development program for the whole Venice area there. And we conceived of the idea that a route to the highway must come down to the ocean front. The street engineers had agreed on that, and the city engineers had [389] agreed on that, and it had been adopted by the various boards; and we conceived the idea that if that road went through there, it would be of great benefit to the Abbot Kinney Company because it would give entrance to all that territory through there and we would be able to have—all the people who wanted to visit the beach could.

Q. Go ahead. A. And you would be able to—

Q. We are not concerned with that. Just get down to how you acquired stock. That is what we want.

A. So the affairs of the Kinney Company were pretty bad, and the foreclosure date was set. Mr. Sherwood Kinney was served a final notice that all of the property of the Abbot Kinney Company was going to be sold. And it was in the depression. And I went up before the Board of Supervisors and persuaded them that it was a very good idea for them to purchase the properties of the Abbot Kinney Company.

Q. Yes.

A. And I made an agreement with Sherwood and his brothers and his sister that if I could save the company by

(Testimony of Alfred Arthur Newton)

forestalling off this foreclosure I would be entitled to 50 per cent of their stock.

Q. And did you get it, Mr. Newton?

A. And I got the 50 per cent of the stock.

Q. Do you still have it?

A. I have about one-third of it. [390]

Q. All right. And did you acquire any other stock in addition to that 50 per cent?

A. I did not acquire it, but as the result of another series of lawsuits there was a settlement made of those lawsuits. And the result of that settlement was we gave an interest in this bond pool to two other members of the Kinney family who were suing. And they assigned their stock to my mother and to Mr. Phil Davis—to my mother because I had got from her and my father's estate continual finances for my expenses so as to give me something to live on in this long period of time I was working on it.

Q. Now what is your present interest in the company right now? What do you claim it is?

A. Well, I claim that—

Mr. Davis: If your Honor please, I might interrupt—

The Referee: Yes.

Mr. Davis: I think it is all reflected in the pooling agreement that is in evidence here.

The Referee: Has it changed since that time? Has it changed since the agreement of December, 1937, which is Gerety's Exhibit 1?

The Witness: Only in respect to the fact that there is now stock that is held in my mother's estate to the extent of half, or I think 23,000 shares.

(Testimony of Alfred Arthur Newton)

The Referee: Q. Your mother has died?

A. Yes. [391]

Q. And has it been distributed out of her estate?

A. It has not been distributed.

The Referee: Proceed.

Mr. Cobb: Q. Out of this 40,000 shares do the Davises have a claim on part of it?

A. They don't have a claim; they have a part of it.

Q. Out of that 40,000 shares how much do the Davises have and how much do you have?

A. All divided equally between us except a small margin of shares that belong to other people—divided between Philip Davis and Thomas Davis and myself.

Mr. Davis: Aren't you in error?

The Witness: Moses C. Davis is the one, that's right. You have no interest in that original agreement.

Mr. Kitzmiller: Q. You are referring to—

Mr. Davis: M. Philip Davis.

The Witness: The 1937 agreement.

Mr. Cobb: Q. You were acting on the Executive Committee on behalf of the stockholders; is that correct?

Mr. Davis: I object on the ground that it is incompetent, irrelevant, immaterial. He was a director of the company.

The Referee: Q. Let us put it this way: Do you know who nominated you for membership on the Executive Committee?

A. Your Honor, it was simply agreed that one man representing the Williams group, one man representing the so-called Newton-Davis group, and one man represent-

(Testimony of Alfred Arthur Newton)

ing the [392] Kinney family should form the Executive Committee.

The Referee: Now we have got it.

Mr. Cobb: Q. This Executive Committee really carried on the business for the Abbot Kinney Company, did it not?

A. If I understand your question correctly, it acted in the place of the Board of Directors when the Board was not meeting.

Q. And they approved leases that were made and deals that were pending and turned down deals; is that generally the way it was worked?

A. When they met—

Q. Would you go to the office during 1944 every Tuesday at 2 o'clock?

A. There wasn't a meeting every Tuesday.

Q. Well, would you go to the Abbot Kinney office on every Tuesday during the year 1944?

A. I went there—Mr. Gerety, when anything important occurred, used to let me know; and if there was not going to be a meeting, there may have been times when I was not there; but I made it my policy to be there on Tuesdays.

Q. Did you go to the office every Tuesday, or did you not?

A. Of course I didn't. I just said so.

Q. And you went only when some one would call you; is that right?

A. No, I went whenever I knew there was going to be an [393] Executive Committee meeting; but sometimes there was no affairs to come before the Committee.

(Testimony of Alfred Arthur Newton)

Sometimes the Committee wouldn't meet for two or three weeks.

Q. How did you know there would be nothing to come before the meeting?

A. When I called up and Mr. Gerety said that Mr. Harrah and Mr. Carleton Kinney were away and had nothing to discuss, I didn't go.

Q. On June 20th you did not go to the company's office at 2 o'clock, did you?

A. I can't remember whether I was there or not. I don't remember any meeting taking place on that date. And I certainly didn't sign any minutes.

Q. Later, the next time you were at the meeting, did you see the minutes of the meeting of June 20th?

A. No, I didn't.

Q. Did you make it a practice to look at the minutes each time you would have a meeting; or did you just—

A. The minutes were generally handed to me to sign if there had been any meetings.

Q. Even though meetings had been held, you did not look at the file or book—

A. I tell you, sir, I relied very much on Mr. Eddie Gerety. He was a man I relied on.

Q. Whether you relied or not, did you—

A. On the 20th? No. [394]

Q. Or you did not on any dates following that?

A. No, that would be taking in a lot of territory.

Q. Did you for the next 30 days look at the minutes?

A. Yes, the minutes were submitted to me.

Mr. Davis: I object on the ground that you are assuming facts not in evidence; that there was a meeting in June, 1944.

(Testimony of Alfred Arthur Newton)

The Referee: Sustained.

Mr. Cobb: I did not ask him whether there was a meeting. I asked him if he looked at the minutes for any meetings—

The Referee: If there were no *minutes* there would be no minutes.

Mr. Kitzmiller: Mr. Cobb was asking as to when he looked at the minutes of June 20th.

Mr. Cobb: That is right.

The Referee: You want to find out when he saw the minutes of June 20th?

Mr. Cobb: Yes.

The Referee: All right.

The Witness: I think about three weeks after June 20th.

Mr. Cobb: Q. And what was the occasion of your seeing the minutes at that time?

A. Well, Mr. Cobb, I discovered that \$7500 had been paid out of the company's assets on a sprinkler contract that Mr. Harrah had said was worthless.

Q. Without explaining to me, will you answer the question, please, what was the occasion for you to see the minutes of [395] June 20, 1944?

A. Curiosity to see what they had written in the book.

Q. Who showed you the minutes?

A. They were just kept in the safe. I think Eddie did.

Q. Did you ask Mr. Gerety to see the minutes?

A. He kept all the papers.

Q. Well, did you ask him?

A. Yes, I asked him.

(Testimony of Alfred Arthur Newton)

Q. What did he say?

A. He showed them to me.

Q. And that was the first time you had seen the minutes of June 20th?

A. As far as I recollect, it was.

Q. And what did you say at that time?

A. Well, I had already discussed the matter with Mr. Gerety.

Q. What did you say at the time he showed you the minutes? A. Just read the minutes.

Q. You didn't say anything? A. No.

Q. Now did you go to the company's office at 2 o'clock on November 7, 1944?

A. No, I didn't know there was any meeting on that day.

Q. Your answer is you did not go to the office, is that right? A. That's right. [396]

Q. And were you in the office on November 8th?

A. I was.

Q. And you attended the stockholders' meeting?

A. That's right.

Q. Who all was present at the stockholders' meeting?

A. Well, there was Mr.—Mr. Harrah was there, and Mr. Pool was there, and Mr. Tom Davis was there. Mr. Phil Davis was there, and Mr. Halper was there, and I was there. Helen Kinney was there, and Mr. Ward was there.

Q. Now did you hear Mr. Pool make any statements at that meeting?

A. He made lots of statements. About what? Maybe I can help you.

(Testimony of Alfred Arthur Newton)

Q. You were there, and will you tell us what statements Mr. Pool had to make?

A. Well, there was argument as to whether he was or was not constituted the attorney for the company at that time.

Q. What did Mr. Pool say?

A. Said he was the attorney.

Q. What else was said?

A. As the result, there was a matter of some discussion about it, and the consensus of opinion of those present was that he wasn't. He said that he represented Mr. Bill Harrah and had a telegram that either he or John proceeded to read to the meeting, saying that—

Mr. Davis: I object on the ground that the telegram is [397] the best evidence.

Mr. Cobb: I am not concerned about that phase of it.

Q. What did you hear Mr. Pool say about the sprinkler contract?

A. I don't remember anything.

Q. Did you hear him state at the meeting or just following the meeting about the \$30,000 payment?

A. I don't remember his talking about the \$30,000 payment.

Q. When did you first hear about the \$30,000 payment?

A. As a matter of fact, I am positive at no time while I was in the room did he say anything about the \$30,000.

Q. When did you first hear of the \$30,000—

A. I think about three days after the meeting.

Q. How did you find out about it at that time?

A. I think Mr. Davis told.

(Testimony of Alfred Arthur Newton)

Q. Now as a member of the Executive Committee did you have anything to do with the books and records of the company? A. No.

Q. And did you have anything to do with the bank account? A. Nothing.

Q. The only information you would have pertaining to the bank account would be what some one might tell you if you asked the question about how much cash there was on hand?

A. The only information I would have would be when we asked our general manager, Mr. Gerety, to make a report or [398] when I asked our auditor as to the condition of it.

Q. Now during the month of June, did you make a request to ascertain what the bank account was?

A. The month of June?

Q. 1944.

A. Yes, I asked Mr. Gerety about that, I think.

Q. When did you ask him?

A. Well, I think the first meeting was supposed to take place was the first Tuesday in June. Now to the best of my knowledge that's about the 6th; and it was about that date that I was in the office waiting for the Executive Committee to take up and I asked Mr. Gerety about the condition of the finances of the company.

Q. Did you at any other date during the month of June ask him about the financial condition of the company?

A. I don't remember whether I did or not. The report was very satisfactory on the early part of June. We had more money then than I expected.

(Testimony of Alfred Arthur Newton)

Q. You did not see a financial statement at that time as to what you owed or what your assets were? They did not make up a financial statement of the company during the month of June? Do you know what a financial statement is?

A. Yes, probably very well. I am just trying to recollect: it was usually our custom to have financial statements in the month of June, that being the sixth month of the year; and I am just trying to recollect whether our auditor was [399] late, due to overpressure of work, or whether it was made at the usual time or not. That I can't remember.

Q. Now do you recall the Executive Committee's turning down any proposed leases that Mr. Gerety submitted to the Committee during the year 1944?

A. The only one that I remember being turned down was in the early part of the year when there was discussion about the leasing of the Bamboo Slide and Mr. Gerety submitted for our consideration an offer on the part of the former owners for a re-lease and we all—I say "we all"; the whole Executive Committee and Mr. Gerety agreed it would be better not to re-lease.

Q. How would Mr. Gerety submit these proposed deals to the Committee? Did he make a written report or an oral report?

A. It just depended. Sometimes he would have a letter from some one. Sometimes he would prepare a brief report as to what was going forward. Mostly, he would just discuss with us informally.

(Testimony of Alfred Arthur Newton)

Q. Then if the Committee approved the deal, would they authorize Mr. Gerety or the president to sign the lease or sign the document on behalf of the company?

A. Well, they would authorize the passage of the lease if they approved of it.

Q. And who would execute it on behalf of the company?

A. Well, whenever the secretary and president were [400] available, they executed it; and when they weren't, Mr. Gerety executed them.

Q. And would you make that provision in your minutes as a rule?

A. I don't remember, Mr. Cobb, if we thought it was necessary to more than simply say the Committee approved this lease and ordered its being drawn.

Q. Do you know of any lease that Mr. Gerety signed on behalf of the company?

A. Well, there are a number of the leases that he signed on behalf of the company.

Q. During the year 1944? A. Yes.

Q. And were there any of those that were not submitted to the Executive Committee?

A. Well, all I can say is, Mr. Cobb, that I wasn't present—

Q. During the times you were present.

A. Was there any lease during the time that I was present?

Q. That he signed that were not authorized by the Executive Committee?

Mr. Davis: I object to that on the ground that it is indefinite. I don't know myself quite what he means.

(Testimony of Alfred Arthur Newton)

The Referee: Overruled. He can answer.

The Witness: Your Honor, I want to get this straight in [401] my mind: do you mean that Mr. Gerety go ahead and sign leases when the Executive Committee said not to?

Mr. Cobb: Yes. Put it that way first.

A. All right, I don't remember Mr. Gerety disregarding any request of the Executive Committee in regard to leases. When the Executive Committee wasn't in session, he carried out the business of the company.

Q. Do you know of any lease that he signed on behalf of the company that was not authorized by the Executive Committee during the period that you were here?

A. I don't remember any.

Q. And did Mr. Gerety ever submit to the Executive Committee a proposal to buy property for the company?

A. To buy property for the company?

Q. Yes. A. You mean to buy land?

Q. Any kind of property.

A. He—if there were any very big orders, he used to sometimes tell us about putting them through. I don't remember his ever having to get permission on any normal business. During the time we were there we never bought any land if that has anything to do with it.

Q. Suppose you were going to buy some equipment to build a Bamboo Slide or something of that character, would he discuss it with the Executive Committee and have it approved before making the purchase? [402]

Mr. Davis: Just a moment. I object to that on the ground that it is assuming facts not in evidence; that it is incompetent, irrelevant, and immaterial; that no proper foundation has been laid.

(Testimony of Alfred Arthur Newton)

The Referee: I will overrule it. Let us see what this witness knows about Mr. Gerety's authority.

The Witness: Now let us take a concrete example: Mr. Gerety, when it was necessary to buy extra supplies for construction work on the pier, used to buy them; and when they were for a large amount, he would sometimes mention the fact to us; and he would do whatever was necessary. If we needed it and he had to buy the supplies, he went ahead and bought them.

Mr. Cobb: Q. You knew that the pier had to be repaired and he would be told to go ahead and see that it was repaired; isn't that right? Didn't the Executive Committee place in his hands the responsibility of seeing that the pier was repaired and of getting the necessary workmen and the materials to carry that out?

A. I don't remember the Committee ever being specific about that. We always found him to be very competent in those things. We felt that he was doing a wonderful lot with a little.

Q. But if he had anything unusual, a deal that was out of the ordinary run of affairs, he would take it up with the Executive Committee; is that right? [403]

A. Well, he told me one time that there was so much lacking that he always liked to, whenever possible, have the approval of the Executive Committee. Now I never heard the Executive Committee say that he couldn't do anything; but when something was of an unusual nature, he used to, if the Executive Committee was meeting, he used to consult them.

Q. And, as a matter of fact, he took up practically everything of any importance during the years 1943

(Testimony of Alfred Arthur Newton)

and 1944 with the Executive Committee as far as you know?

A. All but a few things. And he took those up with the two members of the Executive Committee.

Q. And then if he took those few things up, he took up, then, either with all the Executive Committee or with two members of it, all important matters during those two years?

A. I couldn't say that all important matters were taken up. Mr. Gerety had held his post so long that anything that seemed to him to be good and sound we would go ahead with.

Q. And when the directors voted to remove him in November-December, 1944, you voted against the motion of removal?

A. That's right. I have been very fond of Mr. Gerety and I have voted to support him.

Q. And at the time you made that vote you knew all about this sprinkler contract?

A. Oh, no; didn't I just tell you that I didn't know until three days later about the \$30,000.

Mr. Cobb: May I see the minutes of your December meeting, [404] Mr. Davis?

Mr. Kitzmiller: It was November, November 13th.

Mr. Cobb: Q. I call your attention to the minutes of the corporation of a meeting held on November 13, 1944, in which

"The question of Ed. Gerety's continuance as manager of the company was then discussed. Upon motion duly made, seconded, and carried the following resolution was adopted, that Ed. Gerety be and is forthwith discharged as manager of the company.

(Testimony of Alfred Arthur Newton)

Alfred A. Newton voted no."

Did you so vote at that time?

A. That is correct.

Q. And at that time you knew that the \$30,000 had been paid on the sprinkler contract?

Mr. Kitzmiller: I think, Mr. Cobb, you are in error. I think that—

The Witness: Where does it say I knew about the \$30,000?

Mr. Cobb: Q. Didn't you tell us about three days following the meeting of the stockholders on November 8th—

A. I said I wasn't sure; I thought it was a few days after that.

Q. Didn't you testify that, following the meeting of the stockholders, some three days, you discovered that the \$30,000 had been paid out on the sprinkler contract?

A. Yes, I said that I thought a few days afterwards. Evidently I didn't learn of it until a week later. [405]

Q. Hadn't you learned on November 13th that the \$30,000 had been paid?

A. I don't remember of having known of it until after that meeting.

Q. Didn't you know it at that meeting?

A. If I had known it at that meeting, I wouldn't have voted the way I did.

Q. Did you know it at that meeting?

A. No, I didn't know it.

Q. At that meeting they changed the bank account, did they not, the signatures of the bank account?

A. They did.

(Testimony of Alfred Arthur Newton)

Q. And was it not suggested that a letter be written to the bank withdrawing the right of any of the former officers to sign checks? A. That's right.

Q. And wasn't the ground given for that change that this \$30,000 had been drawn out?

A. I don't remember it so.

Q. You remember at that meeting resolutions were passed about bringing actions to recover this money that was paid on the sprinkler contract?

A. At that time I didn't know about the \$30,000. I know that there was a resolution to recover the \$7500.

Q. And also the \$30,000?

A. I don't know that. It might be so. [406]

Q. Wasn't the firm Nicholas and Davis employing Mr. Cradick to make some investigation and take some action?

A. In connection with the sprinkler contract, yes, Mr. Cobb.

Q. And there was discussed at the stockholders' meeting the \$7500 payment that had been made on the sprinkler contract, was there not?

A. The stockholders' meeting?

Q. Yes.

A. I don't remember its being discussed. You have the minutes of the meeting. We spent almost all that time arguing about the stock.

Q. Now at these previous meetings of the Board of Directors of the company had it been discussed about what the company should do in respect to the sprinkler contract?

A. You say had it been discussed at previous meetings?

(Testimony of Alfred Arthur Newton)

Q. Yes. A. Of the Board of Directors?

Q. Yes.

A. Well, there hadn't been any Board of Directors' meetings due to the fact that we never could get two directors to attend for about a year and a half. You mean prior to that time?

Q. Yes.

A. Well, I don't remember anything about the sprinkler contract coming up at the Board after we had signed a [407] supplemental contract that prevented the statute of limitations running on the Cruickshank contract. That is the last thing that I remember having been discussed at the Board of Directors.

Q. Now following that was there a discussion at the Executive Committee about whether the company should or should not buy the sprinkling system contract?

A. In January, 1943, there was a lot of discussion about that.

Q. Was that the first time it was discussed?

A. That was the first time that we had something concrete that we could do.

Q. Was it the first time it was discussed?

A. At the Executive Committee?

Q. Yes. A. Yes.

Q. And was that the occasion that lasted three days?

A. Well, that's my recollection; that it was that way, sir.

Q. And did you write minutes up of that meeting?

A. The minutes of the final meeting, in which the action was taken, were written up. The two previous discussions on the thing were not written up.

(Testimony of Alfred Arthur Newton)

Mr. Cobb: May I see the minutes on that, Mr. Davis?

Q. Now what date did you say the discussion started, on or about January—[408]

A. I didn't say what date. You have got the minutes there. I said—

Q. Do you recall?

A. I say that the discussions began the day before the date of those minutes there.

Q. If the minutes are dated January 14th, is it your answer that they started on January 13th?

A. That would be it unless that happens to be a Monday, in which case it was the Saturday before.

Q. And did the discussion then last to January 15th?

A. Well, I discussed the matter again after Carleton hadn't been—you see, he wasn't present at that meeting.

Q. Did you have a meeting and discussion on January 15th?

A. A meeting and discussion on January 15th?

Q. Yes.

A. No, I saw Carleton and discussed with him whether he wouldn't vote—I think it was the 15th I discussed it with Carleton. It only takes two members to make a meeting.

Q. Whom did you discuss it with on the 13th?

A. My recollection is everybody that was present on the 13th.

Q. Then you discussed it for how long at that time?

A. My recollection is that we were going into the pros and cons of the situation for about an hour.

Q. And Mr. John Harrah and Mr. Kinney thought that it was better to use the money to pay taxes against

(Testimony of Alfred Arthur Newton)

the real [409] property than to spend the money to buy this conditional sales contract? Was that their position then?

A. That was one of their lines of argument, yes, sir.

Q. Your line of argument was that as a stockholder you would rather see the contract purchased?

A. My line of argument was this, Mr. Cobb: That we could save about \$127,000 for \$10,000, and that it was worth taking a risk; that at the most if we didn't pay our taxes we would be subject to a six per cent penalty; that summer was coming and that in summer we always ran ahead of our actual expenses.

Q. This was in January, was it not?

A. That's right.

Q. And that is at the worst period of the amusement operations, during the month of January?

A. That is correct.

Q. And at that time the company was low on income and finances, was it not?

A. That was the period of the year in which it always has the least money.

Q. Well, it was true in 1943, was it not?

A. Yes, I don't recall the exact amount, although you can easily ascertain it. However, do you want to know on what I was counting to pay this? Is that what you want to know?

Q. I am not interested in that; I am interested in your answering the question. [410]

A. Will you state the question?

Mr. Cobb: Mr. Reporter, will you please read the question?

(Testimony of Alfred Arthur Newton)

(The reporter read the question.)

A. Yes, it was true in 1943.

Q. And Mr. Kinney was also a stockholder as well as a bondholder, was he not?

A. He was a stockholder, and now and then he had a bond.

Q. And he felt that it was better to pay taxes than it was to buy this contract?

A. That was his opinion.

Q. Did you have a conversation with Mr. Gerety following the middle of June, 1944?

A. Following the middle of June? Following the 13th of June?

Q. Yes. A. Yes, I did.

Q. And where did that conversation take place?

A. I don't remember just when it was. Our conversations used to take place in Eddie's office.

Q. Was anybody else present at that meeting?

A. Well, I don't remember—there was always people in and out of that office all of the time. During my discussion there was nobody else there.

Q. And what did you say and what did he say?

A. Well, let's see, the middle of June? I don't remember anything of importance having been said in the middle of June. [411] You see, I didn't learn about this sprinkler contract having been bought, which is what I think you are driving at, until several weeks after that.

Q. Did Mr. Gerety tell you about it?

A. I went down there one day after I had learned about it.

Q. Did he tell you about buying it?

(Testimony of Alfred Arthur Newton)

Mr. Davis: At what time?

Mr. Cobb: Any time.

The Witness: You mean to say did he say, "I bought the sprinkling system contract"?

Q. Did Mr. Gerety at any time tell you about buying an interest in the sprinkling system contract?

A. I asked him, "What is the deal about the sprinkling contract?"

Q. And what did he say?

A. And he said they were going to buy the contract and wanted me to come along with them.

Q. And what did you say?

A. I said, "Who are 'they'?"

Q. What did he say?

A. He says, "Charley Brown and some others."

Q. And what did you say?

A. I says, "Was Bill Harrah one of them?"

Q. And what else was said?

A. And he said he didn't know. [412]

Q. Well, didn't you ask Mr. Gerety at that time if he would sell a piece of the contract to you?

A. No.

Q. Are you sure of that? A. Sure.

Q. Did you at any time ever ask him that?

A. Whether he would sell me a piece of his share of the contract?

Q. Yes. A. No, I didn't.

Q. Did you say anything that would leave that impression, that if you could acquire a part of the contract—

A. That I could acquire a part of the contract from him?

(Testimony of Alfred Arthur Newton)

Q. Him or any one else?

A. I don't recollect any such statement.

Q. Do you remember a conversation along that line that left that import?

A. I told Mr. Gerety that I thought he should have let me know about the whole thing; that if I had known about it, it would all have been worked out on a different program.

Q. You told him that you would have been glad to go in with him, or words to that effect, did you not?

A. No, I told him we ought to work this thing out to get it for the company.

Q. And it is your positive testimony that you did not ask him if you could acquire an interest? [413]

Mr. Davis: Just a moment. I object to that on the ground that it has already been asked and answered.

The Referee: Sustained.

Mr. Cobb: Q. Well did you ask him how much he paid for his share?

A. Well, now, I don't remember that I did, Mr. Cobb.

Q. Well, did he tell you how much was paid for it?

A. He said he had a very small piece in it; and he didn't tell me how much was paid for it.

Q. Did he tell you how much Mr. Brown paid for it?

A. No.

Q. Now what else was discussed at this meeting?

A. With Mr. Gerety at that time?

Q. Yes.

A. Oh, we talked about the general condition of the rents; and he said the reason that he had bought the contract—do you want to go into that?

(Testimony of Alfred Arthur Newton)

Q. Just in regard to the sprinkler contract.

A. He said that he thought he ought to buy the contract so as to protect himself, and that I shouldn't blame him.

Q. Just prior to that, on May 3rd, you attended a Directors' meeting, or purported Directors' meeting, where they attempted to dissolve the Executive Committee?

A. That's right.

Q. And did they also pass a resolution discharging Mr. Gerety at that time? [414]

A. I don't recollect so.

Q. Following that meeting were you present when any one told Mr. Gerety or Mr. Brown that they were fired or discharged?

A. No, there was a great deal of discussion after that meeting as to whether that meeting had existed or not.

Q. But you remember some instructions being given by the Davises that Gerety was no longer general manager?

A. I don't remember any such instructions.

Q. Did Mr. Gerety not tell you that was one of the reasons that prompted him to buy the sprinkler contract, was to protect himself from that action?

Mr. Davis: If your Honor please, I object to that question on the ground that it is incompetent, irrelevant, and immaterial.

The Referee: Overruled.

The Witness: Mr. Cobb, my recollection is that Mr. Gerety said that he thought if they got rid of the Executive Committee then he would be the next.

(Testimony of Alfred Arthur Newton)

Mr. Cobb: Q. And that he thought if he held the sprinkler contract he would have a little better position?

A. It would put him in a little better position.

Q. And you say you agreed with him on that?

A. I didn't say what I did on that.

Q. I thought you said a minute or two ago that you told him you agreed with him or something to that effect?
[415]

A. I don't know. You find out what I said, and I will see whether I said it.

Q. What else was said at this meeting?

A. Well, I expect if I thought about it long enough I could recollect the discussion of some of our tenants and some of the other discussions that went on around there.

Q. Just about the sprinkler contract.

A. I don't recollect anything else.

Mr. Cobb: I think that is all.

The Referee: Are there any other questions?

Mr. Davis: Yes, your Honor.

Redirect Examination

By Mr. Davis:

Q. Mr. Newton, in January of 1943 do you know of your own knowledge what indebtedness, if any, Mr. William Harrah and Margaret Schroeder owed to the Abbot Kinney Company?

Mr. Cobb: We object to that on the ground that it is incompetent, irrelevant, and immaterial: has no bearing on this case.

The Referee: I will hear you.

(Testimony of Alfred Arthur Newton)

Mr. Davis: At that time, as of January, 1943, the evidence will show that William Harrah, this very person whose father is the alter ego, so to speak, actually owed the company in excess of \$16,000; that—

Mr. Cobb: If we want to go into that lawsuit and that [416] problem—

The Referee: I will sustain the objection.

Q. Let me ask you this: You started to tell us, I think, how you proposed to finance the purchase of this contract in January, 1943, for the sum of \$10,000?

A. Yes, your Honor.

Q. How did you propose to do that?

A. Louis Halper owed the company and had agreed to pay in cash about \$4500. My recollection is that the company had something like \$6,000 in the bank and it had several collections that were out that I thought could be brought on and in addition to which John Harrah's son Bill Harrah owed the company some \$16,000. And altogether I thought it was ample—that there was ample money—and that if the worst came to the worst some of us directors who were the most interested could advance the company the small amount in addition to that to get the deal over.

Q. Was there any dispute about the Harrah account? Or was it an acknowledged indebtedness, if you know?

A. It was an acknowledged indebtedness, all right; but it was under process of settlement, your Honor. There was a question—at that time Mr. Harrah—I believe I speak correctly—had offered for his son to settle it for 18 bonds.

Q. What about the Halper obligation? Was that admitted or disputed?

(Testimony of Alfred Arthur Newton)

A. That was disputed up to the time—he said that he [417] would give us so much cash if we accepted the \$4500. I am not saying exactly \$4500, but whatever amount it was.

Q. The company contended he owed more and he intimated he might settle for \$4500? A. Yes.

The Referee: Are there any further questions, gentlemen?

Recross Examination

By Mr. Cobb:

Q. How much did you owe on taxes at that time?

A. Now, Mr. Cobb, the question is how much we owed on taxes on the important pieces of property? Is that what you wanted to know?

Q. I am asking you how much they owed in taxes in January, 1943?

A. I suppose on the taxes we never intended to pay and haven't paid we probably owed about \$80,000.

Q. And this money that you were getting in was being used to meet your tax bills?

A. No, it was talked of that we would reduce certain tax bills that we had.

Q. This \$6,000 in cash you say the company had, was that used to pay on taxes?

A. I think that it wasn't. My recollection is that the company bought some bonds at a heavy discount with some of it and used the rest of it to pay taxes with, both of which, [418] as I recollect now, were considerable savings.

(Testimony of Alfred Arthur Newton)

Q. You knew on the first Monday in March you would have your personal property taxes to be paid down there, that would have to be paid in cash, did you not?

A. Yes.

Q. Do you know what that amounted to?

A. For that particular year?

Q. Yes. A. No.

Q. Approximately how much?

A. Well, it might have amounted to \$2,000. It might have amounted to more than that.

Q. Well, it would amount to more than that, as a matter of fact, would it not, Mr. Newton?

A. I don't know whether it would or not.

Q. You are not quite familiar—

A. I just don't remember something that happened two years ago on a tax matter.

Mr. Cobb: That is all.

The Referee: Are there any questions?

Mr. Kitzmiller: Just one question?

The Referee: Yes.

Recross-Examination

By Mr. Kitzmiller:

Q. Mr. Newton, do you remember in 1943, in January, [419] whether or not the Robbinses had been off the pier for several years prior thereto?

A. Yes—well now, wait a second. They still had their—still had their equipment in that Robbins Building, if that's what you mean.

(Testimony of Alfred Arthur Newton)

Q. Hadn't the matter of their lease on that Robbins Building been settled back in 1939?

A. It never had been paid. And if you will look on the thing, you will find that it wasn't settled finally until September of 1944.

Q. You are sure of that?

A. Well, it's just a matter of record.

Q. And that is the \$4500 you are talking about?

A. I don't say it was \$4500, but it was approximately. It was a nice sum of money.

Mr. Kitzmiller: That is all.

The Referee: Are there any other questions on your side, Mr. Davis?

Mr. Davis: I believe that is all.

The Referee: Step down. Call your next witness.

Mr. Davis: Mr. Newton may be excused. I think that is our case, your Honor.

The Referee: Who wants to go forward?

Mr. Cobb: At this time I will move to strike the testimony given by Mr. Halper in respect to a conference between Mr. Williams and Mr. John Harrah, where Mr. Brown was not [420] present and there is no—the only possible ground on which that could be admissible or binding would be on the ground that there was a conspiracy; and the petitioner having closed his case and no conspiracy having been established, I submit it is hearsay and—

The Referee: Why do you say no conspiracy has been established?

Mr. Cobb: Because there has been no evidence at all that there was any conspiracy between Mr. Harrah; and the evidence is undisputed that Mr. Harrah did not know that Mr. Gerety and Mr. Brown were going to negotiate for this contract until after it was already purchased. The evidence is undisputed that he told Mr. Brown that in his opinion he should not buy it because he would have a lot of trouble, like that the Cruickshank people had, in trying to collect, and that a deficiency was not good if the bonds were foreclosed; that it would probably cause a bond foreclosure if somebody bought the contract; and that there is not one word of evidence showing any joint plan, scheme, or design on behalf of Mr. Harrah with Mr. Gerety and Mr. Brown in acquiring this contract.

The Referee: The motion is denied.

Mr. Kitzmiller: I make the same motion in so far as Mr. Gerety is concerned, your Honor.

The Referee: The motion is denied.

Mr. Vernon: I would like also to make the same motion [421] in regard to my client, William Harrah.

The Referee: The motion is denied. Who wants to go forward?

Mr. Cobb: We will call Mr. Harrah, your Honor.

JOHN HARRAH,

called as a witness on behalf of the respondents, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. Cobb:

Q. Mr. Harrah, did you have a conference with Mr. Williams and Mr. Halper at your office on or about the month of November on a Saturday afternoon in which they brought an agreement affecting the bonds to your office?

Mr. Davis: Just a moment. I object to that on the ground that no proper foundation has been laid as to the time.

The Referee: It is the best time they can lay.

Mr. Cobb: I asked him what time they had the meeting.

Mr. Davis: When?

Mr. Cobb: In November, 1944.

The Referee: Answer the question.

The Witness: November, 1944? No, I have no recollection whatever of having talked to Mr. Williams and Mr. Halper together or to Mr. Halper at all in November, 1944, except [422] in that stockholders' meeting.

Mr. Cobb: Q. It has been testified that Mr. Williams and Mr. Halper called at your office with a contract having to do with the bonds or re-leasing of the bonds or something of that character and you wanted to make certain changes and you agreed to take it and re-draft it, and that following that meeting a discussion was had pertaining to the sprinkler contract.

(Testimony of John Harrah)

Mr. Davis: Just a minute. I object on the ground that it is leading and suggestive. He is suggesting the whole problem, your Honor. Now let him—

The Referee: I think it is all right. Overruled.

Q. Does that refresh your recollection, Mr. Harrah?

Mr. Davis: Might I interpose another objection, on the ground that it is assuming facts not in evidence? As a matter of fact, Mr. Halper testified that he and Mr. Williams presented to Mr. Harrah a consent to the election on the Board of Directors of Mr. Frank Williams and Mr. Philip Davis and it was as a result of that discussion that this other discussion developed.

Mr. Cobb: Thank you, I believe your memory is better than mine. I couldn't quite identify the agreement.

The Referee: We have not as yet gotten the witness to recollect any occasion.

Mr. Davis: He could not recollect this one, because I am sure it did not take place. [423]

The Referee: Q. Mr. Harrah, we are trying to find out about a conversation which you are said to have had on a Saturday afternoon and in the course of which conversation you examined a document and did not approve of the language and in your handwriting you made some interlineations and you said, "I will take this and have it re-drafted." Do you remember such an occasion?

A. I remember Frank Williams bringing in such an instrument one time.

The Referee: Go ahead. Maybe you can develop it from there.

Mr. Cobb: Q. About when was that, Mr. Harrah?

A. Oh, I think it was about March or April, 1944.

(Testimony of John Harrah)

The Referee: Q. This is after the famous \$30,000, about what time?

Mr. Davis: No, your Honor, after the \$7500. It was before the \$30,000. He so testified.

The Witness: No, that was brought in in March or April. That was before they called that Directors' meeting where they didn't get a quorum. That's when that was brought in. I remember that. Frank Williams brought it in and handed it to me.

Mr. Cobb: Do you remember having any meeting, where Mr. Williams and Mr. Halper were present, during the month of November, 1944?

A. I don't remember—in fact, I feel right at the [424] moment positive that I didn't have any meeting with either one of them in the month of November, 1944, except at the stockholders' meeting that had been called and held on November 8th, I believe.

Q. Did you ever have any meeting with Mr. Williams during the month of November, 1944?

A. No, I didn't have any meeting with him.

Q. Did you during the month of October of 1944 have any meeting with Mr. Williams or Mr. Williams and Mr. Halper?

A. No, I only remember one meeting I had with Mr. Williams and Mr. Halper—I think I had only one meeting with them; and that was about—late in June, 1944.

Q. Well, at the meeting that was held in June did you have any discussion with them about the sprinkler contract?

A. Yes, I did.

Q. And who was present at that meeting?

A. Frank Williams and Lou Halper.

(Testimony of John Harrah)

Q. And what was said by you and what was said by them on that occasion?

A. Well, they came into the office there in the liquor store; and Lou said that Frank had told him that Eddie Gerety and Charley Brown bought the sprinkler contract. I said yes, they had. I said they had been paid \$7500 on it. That is my recollection, that it was just after that \$7500 was paid that they came in.

So Lou said, "I am sorry about that." [425]

And I remember distinctly what Frank said. He said some obscene language to the effect that he blamed Lou for not buying it. And he asked him, he said, "Why didn't you buy?"

Lou said, "Well, I didn't seem to be able to work out a deal with Hugh Darling."

And Frank asked me if I had any part of it and I said, "No, I have no interest in it at all."

And the conversation continued—I can't always remember who spoke, I mean whether it was Lou Halper or Frank Williams; but they asked me if I knew what they paid for it. And I said, "They say they paid \$15,000."

And they asked how much Eddie had in it. And I said, "He says he has a third."

They said, "Where did Eddie get \$5,000?"

I said, "I don't know. It wasn't any surprise to me he would have \$5,000."

They said, "Where did Charley Brown get \$10,000?"

I said, "I don't know that either, but I am not surprised that he had \$10,000."

(Testimony of John Harrah)

So they then started in a discussion about what they could do with it; and I said, "Well, as far as I know, they can do whatever anybody else could do with it. We talked that over before, when we were talking about buying it. So they can sue on it or they can wait on it; or they can probably turn the water off, take the sprinkler system out, and then sue the company. There are several things they can do." [426]

They said, "What are they going to do?"

I said, "I don't know any more than what we have done so far. We have paid them \$7500, and we have got an agreement they won't turn the water off for three months."

So Lou says, "Well, it should be possible to work a deal out with Eddie, because all Eddie is really interested in is keeping his job." He says, "I don't like that. I don't want him in there. And," he says, "Frank don't want him in there either."

So then about that time Lou said to Frank, "I'd like to talk to John a little bit. Do you mind waiting for me outside?"

Frank went out; and Lou said, "You know, Frank wants to be manager over there." He said, "He don't know enough to run a peanut wagon; but he has sold all his horses and his wife won't let him stay around the house and he don't know what to do with himself. So," he said, "why not make—there has got to be a scapegoat. Why not make him the scapegoat and put him in there? He will run it as we tell him."

Lou, speaking for himself, said I understood construction and I could say—give advice in the way of con-

(Testimony of John Harrah)

struction and repair; and he said I was versed on what the rental should be, the amount to be collected and things like that. "So," he said, "we shouldn't have any trouble with him."

So I said, "Well, I am not certain that it would work out that way, because it seems to me that you are working pretty [427] well with the Davis group at present and you did not say anything to me or confer with me at all about that Directors' meeting you tried to hold, didn't even tell me you intended to hold one." I says, "I am not so sure about that. But," I says, "I don't care so much about that. But if Eddie is put out of there, he has," I says, "about \$20,000 in bonds and he has his interest in the High Ride and in the Penny Arcade. And some fair offer should be made to him to give him a chance to sell out if you are going to take his job away from him."

Lou said he felt that way himself, and that he would talk to Frank about it. And he says, "I will see you again soon" or "I will call you up and we will get together again."

And that was practically the conversation.

Q. Was anything said about Williams or Halper's acquiring an interest in the contract or acquiring the contract from Brown or Gerety?

A. No, there wasn't; nothing said.

Q. In this conversation did you state to him that "We"—referring to you and somebody else—"have bought the sprinkler contract"?

A. No, no. I said just what I related I said. Frank Williams asked me what part I had of it. Or he might have said, "What part has Bill Harrah got of it?"

(Testimony of John Harrah)

And I said, "None. The only deal he had was the deal with you, the one he was trying to make and didn't make." [428]

Mr. Cobb: That is all I have.

The Referee: Are there any other questions over here? Any cross examination?

Mr. Davis: No questions.

The Referee: Step down. Call your next witness.

(A short recess.)

The Referee: Ready, gentlemen?

Mr. Cobb: Mr. Brown, come forward, please.

CHARLES J. BROWN,

called as a witness on behalf of the respondents, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. Cobb:

Q. Mr. Brown, have you secured from the bank or your files a copy of your bank statement from May 2, 1944, through June? I show you what purports to be a statement of the Security-First National Bank of Los Angeles and ask you if that is a bank statement received from the bank pertaining to your account for the month of May and June, 1944? A. It is.

Q. I call your attention to a withdrawal on January 13, 1944, of \$5,000.

A. You mean June, do you not?

Q. I mean June, 1944. Is that the \$5,000 that you [429] testified to in respect to a cashier's check?

A. It is.

(Testimony of Charles J. Brown)

Mr. Cobb: I desire to offer this bank statement.

The Referee: All right, Brown's Exhibit 1.

Mr. Cobb: Q. Now I show you a check, a counter-check on the Security-First National Bank, dated March 2, 1944, in the amount of \$3500 and ask you if that is your signature? A. It is.

Q. And was that a check used in connection with the acquisition of a cashier's check?

A. It was indirectly.

Q. Will you state the transaction in reference to the \$3500?

A. About that time, January, February, March, I contemplated buying a house.

Mr. Davis: If your Honor please, I object on the ground that it is incompetent, irrelevant, and immaterial.

Mr. Cobb: I can tie it up. I have here—the bank, at Mr. Brown's request, have given me a letter in which they show what their records indicate in respect to his entries into the safe deposit box and also in respect to cashier's checks that were issued by them to him. It is for the purpose of tying that in.

Q. Mr. Brown, did you secure from the bank a statement in respect to cashier's checks purchased by you and also the times that you entered your safe deposit box in the year 1944? [430] A. I did.

Q. And is this the letter that you received?

A. It is, under the signature of the bank.

Q. Mr. Coe is the assistant manager of the bank?

A. Yes.

Mr. Cobb: I desire to offer this as Mr. Brown's exhibit next in order.

(Testimony of Charles J. Brown)

The Referee: Brown's Exhibit 2.

Mr. Cobb: Q. Exhibit 2 refers to a cashier's check in the amount of \$3800. I will ask you whether this countercheck of \$3500 was used to acquire the cashier's checks of that date?

A. I used this \$3500 and \$300 cash, and I bought a cashier's check for \$3800 on the third month, the second day, 1944.

Q. You later cashed the \$3800 cashier's check?

A. On June 6th.

Q. What did you do with the money?

A. I put it in my safe.

Mr. Cobb: I offer this countercheck as exhibit next in order.

The Referee: Brown's Exhibit 3.

Mr. Cobb: Q. Mr. Brown, I show you what purports to be a receipt signed by Mr. Hugh Darling and also by yourself pertaining to the sprinkler contract and ask you if you received this and was it executed by the parties on or about [431] the date that it bears, to-wit, June 13, 1944?

A. It was.

Mr. Cobb: I desire to offer this as Brown's exhibit next in order.

The Referee: All right, Brown's Exhibit 4.

Mr. Cobb: Q. Mr. Brown, you testified the first day that there were two cashier's checks in the amount of \$5,000. Were you in error about that?

A. I was.

(Testimony of Charles J. Brown)

Q. And will you state what amounts the cashier's checks were for?

A. Why, I bought—I went in the bank and I bought a check for \$5,000. And I had promised to meet Eddie Gerety there. So after I went there and bought that check, why, he wasn't there; and I went on out to my safe and got the money and I came back and went into the safe deposit box and took out the balance; and I was there waiting for him to come in.

When he came in, he had a thousand dollars; and he says—I was just there at the window, going to buy my check for \$5,000—he says, "Here is a thousand dollars. You don't want to carry this to town. You might as well buy the check for \$6,000."

I wish to state at this time that when I was in the room that I hadn't seen Eddie Gerety prior to ever being served by this—

Mr. Davis: Just a moment. I object to any gratuitous [432] statement.

The Referee: It may go out.

Mr. Cobb: Q. That was the correction you thought of, after you had had time to think about it, that you wanted to express the first day? A. Yes.

Q. You came then into Los Angeles, and Mr. Gerety bought a cashier's check in Los Angeles?

A. That's right, we came down over here and we parked; and we went over to the International Branch, I guess, and bought a check for \$1500.

Q. Then from there you went to Mr. Darling's office? A. We went to Mr. Darling's office.

(Testimony of Charles J. Brown)

Mr. Cobb: You may cross examine.

The Referee: Any questions?

Mr. Davis: No questions.

Cross-Examination

By Mr. Vernon:

Q. On November 25, 1944, did you sell a part interest in the sprinkler contract to Mr. William Harrah?

A. I sold him a half of my balance of the two-thirds interest in the contract.

Q. That would be a one-third interest altogether?

A. Of the balance.

Q. You sold him one-third of the balance, or one-half of [433] your interest?

A. One-half of my interest, one-third of the total amount due.

Q. Did he pay you for that? A. He did.

Q. What did he pay you? A. \$3,000.

Mr. Vernon: That is all.

The Referee: Are there any other questions? All right, step down. Call your next witness.

Mr. Kitzmiller: Mr. Gerety.

The Referee: Who is calling Mr. Gerety?

Mr. Kitzmiller: I am calling him.

The Referee: Be seated, Mr. Gerety, please. You have been sworn.

EDWARD A. GERETY,

called as a witness on behalf of the respondents, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. Kitzmiller:

Q. You heard Mr. Newton's testimony with regard to a conversation that occurred with you some time shortly after June 13, 1945? A. That's correct. [434]

Mr. Davis: Just a moment. For the purpose of the record I think that you are in error. It was 1944, was it not?

The Witness: 1944, yes. Pardon me.

Mr. Kitzmiller: Q. When did that conversation take place?

A. It was just a few days after we purchased the contract, Mr. Brown and I; and I told him that we had purchased the Cruickshank contract. And of course he asked me what I was going to do with it. And I told him that I was going to collect some money on it when it came time. In the meantime—before that he had asked me if I would sell him a piece of it—by “a piece of it” I mean a part of it. I told him no, that I wasn't interested in anything like that. And so then the other conversation went on there, that he wanted—

Q. Did Mr. Newton in that conversation make any statement to you that you had no right to buy the contract? A. He did not.

Q. I believe you stated, when you were called on cross examination yesterday, that you had talked to Mr. Williams, Mr. Harrah, Mr. Halper, Mr. Carleton Kinney, and they all knew that you at one time or another, up to,

(Testimony of Edward A. Gerety)

we will say, November, 1944—those particular people knew that you had purchased the contract and you had had conversations with them?

A. They knew that I purchased it. I never did talk to Mr. Halper.

Q. You never did talk to Mr. Halper? [435]

A. But I did to the others.

Q. Did any of the other directors ever at any time inform you that you should have purchased the contract for the corporation? A. They did not.

Q. The only matter—or the only time that any such thing occurred was here several months ago, when you received a letter from Mr. Davis?

A. Yes, I received a letter from Mr. Davis.

Q. You heard Mr. Newton testify that on June 6th—or at least he believed it was June 6th; anyway it was a Tuesday around June 6th—he came to you and had a conversation with you in which he requested you to use your influence to have Mr. Harrah buy the contract for the company?

A. There was never any conversation like that between Mr. Newton and myself.

Q. Now, Mr. Gerety, with regard to the duties that you had with the Abbot Kinney Company, did you have any control of the funds of the Abbot Kinney Company?

A. I did not.

Q. And I am speaking now of the year 1944.

Mr. Davis: Just a moment, please. I move that be stricken for the purposes of objection, your Honor.

The Referee: It may go out.

(Testimony of Edward A. Gerety)

Mr. Davis: I object on the ground that it is indefinite as to what is meant by "control," as to whether he had the [436] right to collect the moneys, had the right to endorse the checks, draw checks—

The Referee: Sustained.

Mr. Kitzmiller: Well, I will go over each one of those, then.

Q. Did you have the right to draw checks on the bank account by yourself? A. I did not.

Q. Did you collect the moneys of the corporation during that year? A. No.

Q. Did you endorse checks?

A. No, they were endorsed by stamp, "For deposit" in the bank only.

Q. Did you ever do that? A. No, I never did.

Q. Who did that?

A. The bookkeeper or the cashier.

Q. Did you have the right to compromise any obligations against the company?

A. No, except—if I took it up with the Executive Committee first.

Q. And then only after— A. The approval.

Q. Did you have the right to employ attorneys for the company? [437] A. No.

Mr. Davis: Just a moment, your Honor.

The Referee: Haven't we gone over all this?

Mr. Davis: Yes, I object on the ground that it has been asked and answered, and that—

Mr. Kitzmiller: Not with Gerety, your Honor.

Mr. Davis: Yes, with Mr. Gerety.

The Referee: Or was it with Mr. Harrah?

(Testimony of Edward A. Gerety)

Mr. Davis: I object on the further ground that it is calling for the conclusion of the witness, what his rights were. He might ask him whether he ever did certain things.

Mr. Kitzmiller: It is immaterial to me how I frame the question.

The Referee: All right, the objection is overruled. Let me see what he claims his rights were. Go ahead.

Mr. Kitzmiller: Q. Did you ever loan any of the moneys of the corporation?

A. No, I did not; no, I didn't.

Q. Did you ever borrow any money for the corporation? A. I did not.

Q. Did you ever pledge any of the assets of the corporation? A. I did not.

Q. Did you ever sell any of the property of the corporation?

A. I couldn't sell it; it's a corporation. [438]

Q. Now with regard to, we will say, any accounts, rent accounts, that might be owed to the corporation, did you have the right to, did you ever, compromise the amount of any rent account?

A. No, I had no authority to do that. I would have to get permission from the Committee.

Q. Outside of ordinarily monthly, current bills, did you have any authority to enter into contracts for the corporation? A. No, I did not.

Q. Did you ever enter into any such contract?

A. I did not.

Q. With regard to any of the duties that you had, and I believe you yourself did testify something on cross

(Testimony of Edward A. Gerety)

examination with regard to employing certain individuals, what action, if any, could you take for and on behalf of the corporation without the approval of the Board of Directors, excluding any action in connection with the repairing and maintenance of the properties of the corporation?

A. You mean employees that were—read that again, please.

The Referee: Read the question, please, Mr. Reporter.

(The reporter read the question.)

Mr. Kitzmiller: Q. Excluding any action with regard to employees and any action you could take with regard to the repair and maintenance of the pier, what else could you do, [439] if anything, with regard to the corporate business without the consent of the Executive Committee? A. Nothing that I recall I could do.

Q. Now there was a statement made here a short while ago that Mr. Williams wanted to know where you got \$5,000. Calling your attention to June, 1944, approximately how much were you worth in liquid assets?

A. Well, including the Kinney bonds, I would be worth between maybe thirty and thirty-five thousand dollars.

The Referee: Q. Witness, counsel said "liquid."

A. I can sell those.

Q. For par? A. No, they wouldn't have to be—

Q. You mean for what you could sell them for; is that right? A. Yes.

Q. You would be worth about how much in liquid assets? A. About \$30,000.

(Testimony of Edward A. Gerety)

The Referee: About \$30,000. All right.

Mr. Kitzmiller: Q. Did you ever at any time offer to sell Mr. John Harrah or any one else your one-third interest in that sprinkling system contract?

A. I did not.

Q. Did any one, including Mr. John Harrah, ever have any right to negotiate for the disposition of your one-third interest in that sprinkler contract? [440]

A. They did not.

Mr. Kitzmiller: That is all, your Honor.

The Referee: Q. Mr. Gerety? A. Yes.

Q. Do you recall when you received your \$2500 from the first payment of the \$7500 which was made on the contract?

A. It was some time after it was paid, your Honor.

Q. Do you know when it was?

A. No, I don't know for sure. I know it was a check.

Q. Do you know how much time elapsed, Mr. Gerety? The check, it appears, was dated June 23rd; was credited, apparently credited, on Mr. Brown's bank account at the Security Bank on June 26th though the perforation stamp is June 27th. Do you know how long after that you got— A. It was after that.

Q. Do you know how long? Was it days, weeks, or months?

A. It might have been a couple of weeks or ten days. I am not sure.

Q. Why did that time elapse? A. Why?

(Testimony of Edward A. Gerety)

Q. Yes.

A. I guess I just didn't see Mr. Brown to go get the money.

Q. Wait, some of you Venice people have testified you can't walk out on the street without running into everybody you know. [441]

A. Yes, but to get the check—it was maybe days, your Honor.

Q. What was Mr. Brown's business at that time?

A. He was running the Tango game or the Bridgo game.

Q. At what part of the pier?

A. Right at the head of the pier, the Robbins Building.

Q. The Bridgo game? A. Yes.

Q. Any other concession?

A. And he had the Slide.

Q. Which is that? A. The Bamboo Slide.

Q. On the left-hand side of the pier as you go out?

A. That is correct.

Q. He was not on the company's payroll at that time?

A. No, he was through after that meeting in May.

Q. How long before this contract purchase did Mr. Brown go off the company payroll?

A. He went off the day that they had the meeting there, the first meeting in May, that they didn't have the quorum.

Q. There was no meeting—

Mr. Cobb: They claim there was and tried to fire everybody. Mr. Brown took them at their word.

(Testimony of Edward A. Gerety)

Mr. Davis: That is not so.

The Witness: I did some research the next day; so I advised them that they hadn't properly— [442]

The Referee: Very well. Any questions?

Mr. Davis: If you would like to go through these leases, it is perfectly all right. These are all leases that have been executed, renewals by Mr. Gerety.

The Referee: Mr. Davis, assuming that they are signed by Mr. Gerety, how would that prove he exercised any authority in making the lease?

Mr. Davis: Other than that the agreement itself shows that he was the one that signed them—

Mr. Kitzmiller: We will stipulate he signed lots of them.

The Referee: That doesn't show he did it of his own volition. He could have discussed it with the Executive Committee, and the Executive Committee could have said, "Go ahead and make the lease."

Mr. Davis: Your Honor, I would like to introduce these. If there is any question in your Honor's mind as to Mr. Gerety and his authority and his fiduciary relationship, we will go through all these leases and we will go through every meeting of the Executive Committee and show that these were not discussed at all at the Executive Committee meeting.

The Referee: I cannot tell you what my conclusion is going to be until after the case is closed. You put in whatever evidence you think is necessary to support your position.

Mr. Davis: Just let me introduce a few for the purpose of the record, and we will limit it to that. [443]

(Testimony of Edward A. Gerety)

Cross-Examination

By Mr. Davis:

Q. I call your attention, Mr. Gerety, to a letter dated June 10, 1943, directed to Robert Murphy—

A. That is correct.

Q. —in which you state:

“Dear Sir:

“This is to advise you that your lease on Booth 29, Venice Pier, has been extended one year to April 1, 1944.

“The rental is to be \$35 per month for January, February, March, April, September, October, December and \$50 per month for the month of May and \$90 per month for June, July, and August. All other terms and conditions are to remain the same as in the original lease.

“If this is satisfactory to you, kindly sign the enclosed copy of this letter and return it to us for execution, after which we will return one copy to you for your record.”

Did you send that letter? A. I did.

Q. Is that your signature?

A. Right there, yes, sir.

Mr. Davis: E. A. Gerety. All right.

Your Honor, I don't want to introduce these, because these [444] are our original—

Mr. Cobb: Their own witnesses testified that Mr. Gerety was authorized by the Executive Committee to handle the execution of these leases, and that if there weren't officers around he would sign them.

The Referee: Are there any other witnesses?

Mr. Davis: No other witnesses.

Mr. Cobb: I wanted to offer a portion of the answer that has been filed in this proceeding in connection with the answer to the involuntary petition, the corporation's amended answer, filed with this Court on July 20, 1945, wherein the corporation asserts that "In respect to the said"—I will read it:

"Respondent further admits that the petitioners own certain of the bonds aforesaid, but is without information or belief as to the total amount owned by said individuals, and its denial of the amount of the bonds owned by them is measured based on that ground. In respect to said alleged indebtedness of said petitioning creditors, respondent alleges that any alleged indebtedness owing to said petitioners, or any of them, is barred by the sections of the Code of Civil Procedure of the State of California pertaining to limitations prescribed for the commencement of actions, and particularly is barred by the provisions of Subdivisions (1) and (2) of Section [445] 336-A of the said Code of Civil Procedure of the State of California."

May that evidence be received by reference, your Honor?

The Referee: You have read it into the record, have you not?

Mr. Davis: I object, your Honor, on the ground that it is incompetent, irrelevant, immaterial, and has no bearing on this proceedings and is not properly a part of the record.

The Referee: Overruled.

Mr. Cobb: I further want to offer by reference, rather than reading it, the quotations taken from the Trust Indenture contained on page 65, being Section 1 of Article 11, truly copied and set forth in the petition in in-

tervention filed on July 19, 1945, in this matter. In order not to have to read it, if the reporter may copy the two and a half pages that pertain to those sections—

Mr. Davis: I object on the ground that it is incompetent, irrelevant, and immaterial, and has no bearing upon the issues in this case.

Mr. Cobb: That indenture provides generally, without going into it, that any action is vested in the Trustee; that under the Trust Indenture no bondholder has the right to take any action to enforce his obligation against the company. It must be taken by the Trustee on behalf of all bondholders.

Mr. Grainger: That covers the same thing we had in the argument before Judge Dickson. Of course there are other [446] portions of that Indenture which state that that has no application where there is a question on the matter of fraud, and so forth.

The Referee: The objection is overruled. It may go in. You have definitely designated now what it is? First give us the caption of the instrument.

Mr. Cobb: The caption of the instrument is: "In the Matter of Abbot Kinney Company, a California Corporation, Alleged Bankrupt, Petition in Intervention in Opposition to Amended Involuntary Petition on file here."

The Referee: Filed when?

Mr. Cobb: July 19, 1945. And the portion that I desire to offer is Paragraph X of the said petition in intervention.

The Referee: On page what?

Mr. Cobb: On page four, commencing on page four and ending on page six.

The Referee: All right, if the record has to be made up the reporter will include it.

“X

“That the Trust Indenture securing said bonds provides on page 65, Section 1, Article 11:

“All rights of action on or because of the bonds issued hereunder or the interest coupons thereto appertaining and all rights of action under this Indenture are hereby expressly declared to be vested exclusively in the Trustee, except only as hereinafter provided; [447] and such rights may be enforced by the Trustee without the possession of any of the bonds issued hereunder or the interest coupons thereto pertaining. Any suit or proceeding instituted for the Trustee shall be brought in its name as Trustee, and any recovery or judgment shall be for the prorata benefit of the bonds issued hereunder and the interest coupons thereto appertaining.

“Section II: Any requesting direction, resolution or other instrument required by this Indenture to be signed and executed by bondholders may be in any number of concurrent writings of similar tenor, and may be signed or executed by such bondholders in person or by attorney or agent appointed in writing. Proof of the execution of any such request, direction, resolution or other instruments, or of the writing appointing any such attorney or agent, and of the ownership of bonds, if made in the following manner, shall be sufficient for any purposes of this Indenture and shall be conclusive in favor of the Trustee with regard to due action taken by it under such request.

“Section III: No holder of any bond or coupon secured hereby shall have the right to institute any suit,

action or proceeding at law or in equity, upon or in respect of this Indenture or for the execution [448] of any trust or power hereof or for the appointment of a receiver or for any other remedy under or upon this Indenture, unless such holder shall previously have given to the Trustee written notice of an event of default, and unless also the holders of twenty-five (25%) percent in amount of the bonds secured hereby then outstanding shall have made written request upon the Trustee and shall have afforded to it a reasonable opportunity either to proceed itself to exercise the power hereinbefore granted, or to institute such action, suit or proceeding in itself or may, and unless also such holders shall have offered to the Trustee reasonable security and indemnity against costs, expenses and liabilities to be incurred in or by reason of such action, suit or proceeding; and the Trustee shall have refused or neglected to comply with such request within a reasonable time thereafter. Such modification, request and offer of indemnity are hereby declared in every such case at the option of the Trustee to be conditions precedent to the execution of the actions and trust of this Indenture and to any action or cause of action for foreclosure or for any other remedy hereunder. It is understood, intended and hereby provided that no one or more holders of bonds or coupons shall have any right in any manner whatever [449] to affect, disturb or prejudice the lien of this Indenture by his or their action, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings hereunder shall be instituted, had and maintained in the manner herein provided for the equal benefit of all holders of such outstanding bonds and coupons."

The Referee: Is there anything else, Mr. Cobb?

Mr. Cobb: In connection with this proceeding, I would like to offer the amended and voluntary petition as part of the record here unless it is.

The Referee: You will have to offer it. The amended involuntary petition?

Mr. Cobb: Yes, your Honor.

The Referee: All right, that will be deemed to be a part of the record; and the reporter will take note of it.

“In the Matter of ABBOT KINNEY COMPANY, a
California Corporation, Alleged Bankrupt,

In Bankruptcy

No. 43-551-O'C

FIRST AMENDED INVOLUNTARY PETITION.

“To the Honorable J. F. T. O'Connor, Judge of the District Court of the United States, for the Southern District of California:

“The first amended petition of Frank Williams, Moses C. Davis and Charles W. Cradick, respectfully shows:
[450]

“1. That Abbot Kinney Company is a corporation organized and existing under the laws of the State of California and that it is a business corporation and is not a municipal, railway, insurance or banking corporation, or a building and loan association.

“2. That the said Abbot Kinney Company has for more than 25 years next preceding the date of the filing of the original Involuntary Petition in the above-entitled matter, had its principal place of business at the

Venice Pier in the City of Los Angeles, County of Los Angeles, State of California, in said district.

"3. That the said Abbot Kinney Company owes debts in excess of \$100,000 and is insolvent and is not a wage earner or farmer.

"4. That each of the petitioners are creditors of said Abbot Kinney Company, each having a provable general unsecured claim against Abbot Kinney Company fixed as to liability and liquidated in amount, which, in the aggregate, amounts to more than \$500 over and above the value of securities held by each of them.

"5. That the nature and amount of your petitioners' claim and the securities held by them, are as follows: That on the first day of April, 1931, Abbot Kinney Company issued its Trust Indenture, securing an authorized issue of \$350,000 First Mortgage 7% [451] Sinking Fund Gold Bonds, which Gold Bonds, under the terms of said Trust Indenture, were due April 1, 1944. That there is presently outstanding and unpaid, \$269,000 principal amount of said bonds. That there is presently due in interest on said outstanding bonds, a sum in excess of \$225,000. That the Abbot Kinney Company also owes taxes which are liens against the property securing said unpaid bonds, in a sum in excess of \$75,000. That the total reasonable market value of all of the assets of Abbot Kinney Company securing the payment of said outstanding bonds, is less than \$400,000. That the assets of Abbot Kinney Company securing said unpaid bonds, have a value of at least \$100,000 less than the total amount of principal and interest presently due on said bonds. That your petitioner Frank Williams owns more than \$75,000 of the face amount of said unpaid bonds

and your petitioners, Moses C. Davis and Charles W. Cradick, each own not less than \$1,000 of the face amount of said unpaid bonds. That your petitioners do not waive the security for said bonds.

“6. That within 4 months preceding the filing of the original involuntary petition in the above entitled matter, viz., on the 23rd day of June, 1944, the said Abbot Kinney Company, while insolvent, committed an act of bankruptcy in that it did pay out of [452] its assets, to Charles Brown, Ed. Gerety and so plaintiff is informed and believes and upon that ground alleges, to William Harrah and John Harrah, the sum of \$7500 on an antecedent debt due them by Abbot Kinney Company, which payment was made for the purpose and with the intent of preferring said Charles Brown, Ed. Gerety, William Harrah and John Harrah, over the other creditors of said Abbot Kinney Company.

“Wherefore, your petitioners pray that service of this petition, with the subpoena, may be made upon Abbot Kinney Company, as provided by said bankruptcy law of 1898 as amended, and that it may be adjudged bankrupt within the purview of such law.

(Signed) FRANK WILLIAMS
MOSES C. DAVIS
CHARLES W. CRADICK

Petitioners

NICHOLAS & DAVIS

By M. Philip Davis

Attorneys for Petitioners

State of California

County of Los Angeles—ss.

“Frank Williams, Moses C. Davis and Charles W. Cradick, the Petitioners above named, do hereby make [453] solemn oath that the statements contained in the foregoing amended petition, subscribed by them, are true.

(Signed) FRANK WILLIAMS
MOSES C. DAVIS
CHARLES W. CRADICK

Subscribed and sworn to before me this 28th day of February, 1945.

(Notarial Seal) GRACE B. HUNTLEY,
Notary Public in and for the County of Los Angeles,
State of California.”

(The foregoing Creditors’ First Amended Involuntary Petition bears file mark:

“Filed Feb. 28, 1945, at 45 min. past 2:00 o’clock p. m.
HUGH L. DICKSON, Referee,
J. B., Clerk.”)

The Referee: Is there anything else, gentlemen?

Mr. Cobb: I don’t believe there is anything further from Mr. Brown.

The Referee: Do any of you other gentlemen have anything on the side of the defense?

Mr. Kitzmiller: No, your Honor. [454]

The Referee: Do you stipulate, Mr. Davis—

Mr. Davis: That is all, your Honor. Mr. Grainger thinks that—

Mr. Grainger: If your Honor please?

The Referee: Yes.

Mr. Grainger: We wish also to read into the record from page 96 of the Trust Indenture the following—

Mr. Cobb: There isn't any page 96 in the Indenture, but perhaps in your copy—

The Referee: Doesn't it have an article or paragraph number?

Mr. Grainger: Do you have the original there, Mr. Cobb?

Mr. Cobb: I have a copy of—

Mr. Kitzmiller: How does it start? Maybe I have a copy.

Mr. Grainger: It is contained in Article—

Mr. Kitzmiller: I have a page 96, Mr. Cobb. If you will—

Mr. Grainger: Line 18.

Mr. Kitzmiller: "Provided, however"?

Mr. Grainger: "Provided, however, that nothing contained herein shall defeat the right of an individual bondholder to pursue his legal right of equitable remedy where his right of action arises out of collusion, fraud, wilful negligence, or gross misconduct."

Mr. Cobb: I think we would have to tie that in further. That refers to the Trustee not acting in—

Mr. Grainger: That refers to the rights of the bondholders. [455] Personally I don't think any of that is material. But if one goes in, I think this should.

Mr. Cobb: I won't have anything in addition myself.

The Referee: Is there anything else, gentlemen? Are you all through? All finished? The case stands submitted, subject to argument?

Mr. Davis: Yes, your Honor.

The Referee: The argument will be made first by the respondents. Who wants to be heard? The question first is: Is Mr. Gerety in a confidential or fiduciary relationship, or was he, to the Abbot Kinney Company at the time of the purchase of the sprinkler contract? That is question number one.

Question number two, who were the real moving parties in the purchase of the sprinkler contract? Were they simply, as contended here, Mr. Brown, with Mr. Gerety holding on the record a secret one-third interest; or were the real moving parties Mr. John Harrah, Mr. Brown, and Mr. Gerety? Now in connection with Mr. Harrah it may be that if he was a party at all he acted not for himself but for his son William Harrah. So I want to hear from the respondents on those two questions. And I will hear them on any other question that they think should be argued.

Mr. Cobb: I think the petitioners here should set up what they claim of the interests of Mr. Brown are invalid. You can't tell whether they claim the whole contract is [456] invalid or whether they claim that he holds as Trustee for them. It is just a shot-gun affair. Part of their request for relief is inconsistent.

The Referee: In what way?

Mr. Cobb: In other words, they admit the validity of the conditional sales contract; but they claim that the conditional sales contract is not a valid conditional sales contract. And if it should be so adjudged, that is inconsistent in claiming there is a trust. Third—

Mr. Grainger: Where do we claim that?

The Referee: Well, the prayer is that the alleged bankrupt is the owner of the sprinkler system and the contract is free of any claim of said parties or any of them. I don't know how you can possibly go that far, that the bankrupt is the owner of the contract. What do you mean, that they have part of the obligations under the contract or what?

Mr. Grainger: The thought first, if your Honor please, is that we claim of course that they hold as involuntary trustees. Of course then, upon that coming into the hands of the alleged bankrupt, the one who owes the money, there would then be a merger of course.

The Referee: Well, if the petitioners prevail here, it will have to be on the theory that the purchasers of this contract stood in a fiduciary relationship to the company. Is that correct?

Mr. Grainger: That is the basis of the— [457]

The Referee: That they had no right to purchase it personally without first giving the company the same opportunity of which they availed themselves? Isn't that right?

Mr. Davis: I believe that is the position, yes.

The Referee: In other words, they purchased a claim against the company—they purchased a claim against the company for something substantially less than the amount of that claim. They attempted to put themselves in the position of the claimant. In other words "For \$15,000," they said, "we are now in a position to claim \$137,000 from the company."

Now if the bankrupt is to prevail here, it must be upon the theory that whoever purchased this contract for \$15,000 stood in a fiduciary relationship to the company; that they had no right to consummate that transaction and

acquire that claim without first putting the corporation upon notice, without giving the corporation an opportunity to make the same deal which they were able to make and which they did make.

All right. Now—

Mr. Grainger: One added consideration: Of course, likewise, if some of the parties are fiduciaries and one of the others might not be a fiduciary, if he knows that he is dealing with a fiduciary—

The Referee: Those are refinements of the situation that we will get into later. Now, then, if the Court should go along with the petitioners that far without at this time [458] making any determination of who the purchasers might be—let us see, whoever the purchasers were, if they stood in a fiduciary relationship, then the corporation is liable or was liable to the purchasers for whatever they actually paid; is that correct?

Mr. Grainger: I think that the corporation would have to do equity, and that might be the equity.

The Referee: It certainly—

Mr. Grainger: I think that probably is the situation. There might be a question in this instance, if we should prevail, whether it should be \$15,000 or whether it should be the \$10,000 that it could have been obtained for.

The Referee: Well, certainly the corporation's obligation to the Cruickshank Company has been dissolved, has it not?

Mr. Davis: Yes.

The Referee: The corporation no longer has any obligation to the Cruickshank Company?

Mr. Davis: That is correct, your Honor. It is out of it.

The Referee: That being so, then, if the purchasers stood in a fiduciary relationship and their claim against the company was limited to what they had been out of pocket, then on the same reasoning and on the same basis the corporation has a liability to them for what they put out in order to put the Cruickshank Company out of the picture.

Mr. Davis: I think your observation is right, your Honor; [459] and that of course is the theory we were going on. There is one thought; I would like to present it for what it is worth.

The Referee: Yes.

Mr. Davis: That is that if Mr. John Harrah and Mr. Carleton Kinney and Mr. Eddie Gerety, in exercising their fiduciary obligation, had deemed that it was for the best interests of the corporation to purchase this on behalf of the corporation and had not as a result interfered, the corporation itself would have purchased it for \$10,000. Now that offer was actually presented.

The Referee: I will settle that point for you right now. I don't think you have a leg to stand on, because the trouble with you fellows was you were trying to get it for nothing. Nobody would put up any money. You had this \$10,000 thing dangling, but you were hoping that things would so work themselves around that perhaps nothing would have to be paid on the Cruickshank contract; and you were not going to put out any money unless you absolutely had to. And I am not going to hold these people, if I hold with you at all—that these people are going to have to be penalized for \$5,000. I don't think there is a chance in the world of your getting that. That I think clears up the situation. And that is

the relief that could be granted on this petition; namely, a decree that the present owners of this contract could not collect anything in excess of \$15,000 on the contract. [460]

All right, who wants to argue first?

Mr. Kitzmiller: With regard to the first point your Honor raised, was Gerety in a fiduciary relationship?

The Referee: Yes.

Mr. Kitzmiller: Before even talking about the facts with regard to that, I would like first to quote from the Corpus Juris. This seems to be about the best statement I can find of the law with regard to this particular matter. It speaks of a director or officer—and we need not go into the question as to whether Gerety is an officer or anything like that; there is law in California holding that he is not an officer; and there is some law, an industrial accident case, holding that he is an officer of the corporation; and I think it is too much of a refinement to argue one way or the other here. The thing that would determine that would be his duties and his powers and his discretion and so forth and so on. And that is more of a matter of fact than just a blanket statement that he is or is not an officer. Reading from Volume 19, Corpus Juris Secundum, Section 800, Page 185:

“A director or officer has a right to purchase the outstanding obligations of the corporation and enforce payment of the same, unless the circumstances surrounding the transaction render it inequitable for him to do so; and where the corporation is a going concern he may purchase at a discount and recover the full value of the claim unless there is a present duty to act for [461] the corporation by purchasing or extinguishing the claim, and the rights of other creditors are not involved. Where,

however, the corporation is insolvent he is precluded from recovering more than he paid for the claim."

Now that is the general statement of the law. In other words, an officer or a director has a right under normal circumstances to acquire a claim against a corporation at a discount and charge the corporation the full amount unless the corporation is insolvent. And there has been no showing here; so I don't think we have to go into the insolvency question. In fact, evidence was prevented from being put in there to show that the corporation was solvent. So we have here a corporation that is solvent, though it might not be ready cash—and I can go into other cases on the matter of this ready cash when we get down to the refinement—but here are the facts we have before we get to the specific case law: Mr. Gerety was manager of the Abbot Kinney Company. I don't care whether you call him general manager or what you call him. Mr. Gerety, as such manager of the corporation, had no power or no duty to negotiate for and on behalf of the corporation or for and on behalf of the Executive Committee or the Board of Directors for this contract. The witnesses that have testified here—and that is the directors, Mr. Harrah, we will say, an adverse witness; Mr. Newton, favorable to the petitioners; Mr. Halper, favorable to the petitioners; [462] and Mr. Halper quoted Mr. Williams. But we have this situation: that from 1937 on down to 1944 the Board of Directors, the Executive Committee, the stockholders, knew of this Cruickshank contract; and some of the members of the Board of Directors wanted to buy the contract, irrespective—we will say for the corporation, forgetting any individual motives—the Newton and Davis group wanted

to buy it for the company and solely for the company. On the other hand we have Harrah and Halper and Williams—Williams being a bondholder and having a portion of the time been a director—and Carleton Kinney not wanting to buy the contract for the corporation. Irrespective of whether the best interests of the corporation would be served by the purchase of that contract, there wasn't any duty on the part of Mr. Gerety to purchase the contract, to negotiate the purchase of the contract. The evidence from the witness produced by the petitioners, Mr. Darling, shows that negotiations had gone on for a year or a year and a half with Mr. Davis and so forth. And what could Mr. Gerety add to the picture and what could Mr. Gerety do in the way of having the corporation purchase that contract?

No evidence at all has come out that he neglected to discuss with any one, except one statement by Mr. Newton, which was contradicted, that he, on June 6th, I believe it was, was asked to help Mr. Newton influence Mr. Harrah to purchase the contract. Mr. Gerety denies that. But suppose [463] he did talk to him about purchasing the contract. What possible relationship was there with Mr. Gerety and with other people negotiating for the contract—and irrespective of whether the other people that were negotiating for the contract were members of the Board of Directors, they were not purchasing the contract—what duty was there on Mr. Gerety that would prevent him from going out and buying the contract? Was there anything that he knew about the contract that was not known to the other officers or the Board of Directors of the company? What fiduciary relationship did he fail to carry out by going and negotiating for the

contract for himself, irrespective of Mr. Brown and so forth and so on?

If he had gone to the Cruickshank people—there is no showing that the company would ever have taken it over. There is no showing he could have done anything—we will say from the first of June to the 13th or even back for a year and a half—that would have aided the company to go ahead and purchase this contract, not a thing that he could have done.

On the other hand—and his motives were, as he said, that he thought that the contract would do him good, they were talking about ousting him—on the other hand, if he hadn't purchased the contract, was there any particular detriment that could have occurred to the corporation? None that I can see. In other words, you cannot go out into a problematic situation that maybe Cruickshank, who had been going along for years and had not collected any money—and [464] after the Davises started to tell him that so much would be paid and then Halper came along and other people came along—you can't say this contract suddenly started to assume some sort of a value to the Cruickshank people. There is no knowing whether or not they would not have gone along after they sent this notice and tried to negotiate some sort of a settlement, maybe on a \$7500 basis as that first payment, maybe on a \$30,000 basis for the second payment; maybe a \$15,000 basis or a \$5,000 basis as a second payment. There is no telling what they would have done.

But there is nothing to show that Mr. Gerety's purchasing the contract did of itself hurt the company or that Mr. Gerety violated any fiduciary relationship he had with the company. He had no fiduciary relationship

with the company. He had no discretionary powers in so far as the corporation was concerned. The best that can be said of him is that he was merely a ministerial officer.

Now with regard to other cases that may be in our favor, very much in point: I would like to read from what I consider the best case on the subject. We have the California case that is fairly good; but the best, I believe, is that of Glenwood Manufacturing Company vs. Syme, et al., 85 Northwestern, 432, Supreme Court of Wisconsin. I will briefly go over a part of the facts. When I give the facts, they will be the pertinent ones and truly stated. Alexander Syme was president and a director of the plaintiff. [465]

“Plaintiff’s business was manufacturing and selling wood products at Glenwood, Wisconsin. The value of its property and assets was \$300,000, and its liabilities other than its capital stock were \$227,000. On November 1, 1898, and for a considerable time thereafter, the company was embarrassed for want of ready money, and unable to pay its debts as they matured. . . . On November 1, 1896, plaintiff was indebted to one H. L. Humphrey, as assignee of Alfred J. Goss, on two notes of \$9,000 each, but which had been reduced by payments to the sum of \$11,000. . . . Humphrey offered to sell the notes to plaintiff” (that is, the corporation), “the 427 shares of stock, and the three-eighths interest in the said firm for \$15,000, then worth at the aggregate at least \$45,000. Alexander Syme purchased the same for \$15,000, for himself, without the knowledge or consent of any of the plaintiff’s stockholders, knowing that the purchase by plaintiff would be greatly for its interest.”

(This is the director and the president of the corporation.) "To conceal the true character of the transaction Syme caused the purchase to be made in the name of W. P. Hewitt, who owned the firm until October 11, 1897, when it was turned over to Syme. . . . In February, 1897, plaintiff was indebted on a note of \$18,000 to the [466] Skowhegan Trust & Savings Bank upon which Syme was the endorser or guarantor. Without the knowledge and consent of any of the stockholders, or without any effort to purchase the same for plaintiff Syme purchased the same for \$9,000 with his own funds. . . . On October 11, 1897, Syme presented the notes he had purchased from the bank and from Humphrey to the plaintiff, and demanded and received a note for the sum. . . . Syme died intestate, holding such claim. . . . The prayer for relief" (I am skipping through this) "is for an accounting regarding the three-eighths interest in the afore-said firm, and a settlement on the theory that plaintiff was entitled to the benefit thereof; also that plaintiff is entitled to the 427 shares of stock, and the surrender of the notes taken in renewal of the ones purchased from Humphrey and the bank, upon allowance of the sum actually paid out by Syme."

Those are the facts in this case. And here is the law in the case—and, as I say, I think this particular case goes into the law more fully than any other case that I have been able to find:

"The remaining question involves the right of an officer and director of a corporation to purchase outstanding liabilities of the corporation at a discount [467] and enforce them in full. . . . The rule has been broadly stated by some of the authorities that 'A trustee,

executor, or assignee cannot buy up a debt or encumbrance to which the trust estate is liable for less than is actually due thereon, and make a profit to himself.' That is the doctrine sought to be invoked in this case, as applicable to a director regarded as a trustee of the corporation. But the statement, however correct in its application to specific instances, must be taken with the limitations which belong to it. The foundation of the rule is that a fiduciary agent, owing the duty to his principal, cannot make a contract for his own benefit which is inconsistent with that duty. It is where there is a collision between trust duty and personal interest that the equitable prohibition applies. The cases usually cited to support the doctrine are where a trustee buys in the property of his principal at a sacrifice for his benefit, when, if he bought it at all, it was his duty to do it for his principal, or he makes a contract on behalf of his principal with himself, directly or indirectly, as the other party to the agreement, or where by some secret arrangement he makes a profit directly at the expense of his principal. . . . As before stated, the entire basis of the rule consists in the collision between trust duty and [468] personal interest. Can it be said that any such conflict exists in the ordinary case of the purchase by a director in a going corporation of its outstanding obligations? This is the test to be applied to the facts stated in the complaint. . . . There was no present duty upon Syme to extinguish the note so far as it appears from the complaint. It is not charged that he neglected any duty he owed to the corporation in not securing funds for their discharge, or that he diverted any of its moneys properly applicable thereto to other purposes. The plaintiff's case rests upon the proposition

that, being an officer, he could not purchase said notes at a discount. We are not prepared to accept this statement in its entirety. It is only in cases where the conflict of duty arises that the rule is received in its fullest application." It goes on:

"In MOR Private Corporation, Section 521, it is said: 'So an agent of a corporation may purchase claims against the company at a discount, and enforce them in full if he is not under an obligation to make the purchase on behalf of the corporation.' The Supreme Court of Kansas approved the statement as the law in a case where the treasurer of a railroad purchased its promissory notes at a discount and he was allowed to enforce them at their face value. In *Inglehart versus Hotel Co.*, [469] 32 Hun., 337, the law is stated thus: 'So, also, a trustee or director may with his own money purchase for himself, or of a third person, a valid and subsisting outstanding debt owing by the company, and securing a perfect title thereto. Such a transaction is not even the ground for entertaining the suspicion that it is in violation of any duty which he owes the corporation, and there is no presumption of law against its fairness. . . . The other question to be considered in this connection is, will the trustee or director be permitted to enforce a collection of the debt thus acquired for its entire amount, or shall he be limited to the sum paid for the debt or obligation. I am unable to discover any good reason why he should not be permitted to enforce payment for the full amount, nor can I find any decision limiting the trustee to the sum actually paid.' "

Then it says,

"But we need not prolong the discussion. As we construe the complaint, it fails to show any breach of duty

on the part of Mr. Syme for which he could be held liable in this action.”

As I say, that particular case to me was the best statement of the law.

Coming now to California—

The Referee: We will have to interrupt you now and take an adjournment. [470]

Los Angeles, California. Friday, July 27, 1945. 10:00 O’Clock, A. M., Session.

(Whereupon ensued argument by counsel, at whose request the proceedings were not reported.)

The Referee: This matter is before me as a Special Master. Counsel for the petitioners have prepared the Special Master’s report?

Mr. Grainger: This is not as a Master.

The Referee: I have seen only one order, and that is the Special Master. Did you get another order?

Mr. Davis: As we understood it, the Court would bring that over, your Honor. The whole matter has been referred to your Honor as a Referee in Bankruptcy.

Mr. Kitzmiller: That is what we understand.

Mr. Davis: What was that order—

The Referee: We have only one order here, that of the Special Master.

Mr. Grainger: That has to do with the issues as to the involuntary—

The Referee: It does not say so.

Mr. Davis: The point was that Judge O’Connor said that the whole matter would be referred to you, and we asked the specific question, “Will the clerk prepare the order of transfer?” And he said yes. And this—

The Referee: You get it straightened up. If it is [471] referred to me as Referee, then prepare findings, conclusions and order. If it is referred to me as Special Master, prepare the report, including findings and conclusions and the recommendations.

All right, there is no question at all in my mind, gentlemen. This picture is so clear it does not admit of any doubt whatsoever. A very old and distinguished and venerated member of this Bar, J. Wiseman MacDonald, said, "For every wrong there is a remedy." There is no question but what there is a wrong here.

You have read from some decisions, most of them old decisions; but I think the court is modernizing itself all the time to do more and more equity and more and more justice. And even the cases you rely on contain the phrase "in the absence of fraud or inequitable circumstances." Here we have both. We have the fraud, and we have inequitable circumstances.

I am not going to take up your time unnecessarily in a discussion of the point I raised, because I am entirely satisfied beyond a question of a doubt that there is not only preponderance of the evidence but that the proof has been made beyond a reasonable doubt that here was an unconscionable conspiracy and confederation, headed by John Harrah, to gain an unconscionable advantage for himself over the other people with whom he was connected one way or another in this corporation. All down through the years he has taken the [472] position, and with good, sound reason, that no money should be paid unless it became absolutely necessary on this Cruickshank Company contract because it would be to the disadvantage of the bondholders. He had a right to take that position. Everybody knew what his place was in the set-up, that

he represented the bondholders. The other people, who were capable and competent to take care of themselves, were in the picture to take care of themselves; so it cannot be said that Mr. Harrah was recreant in his duty because he looked out for the bondholders. Yet, in spite of this record, we find that this contract is purchased and that \$7500 is almost forthwith paid on it. Now why? Because, by a strange coincidence, at the same time the Cruickshank Company had sent out a letter threatening to turn off the water. The attorney who prepared that letter, who caused it to be sent, said it was just for the purpose of establishing a technical default. But, as I say, by a coincidence it comes at the same time. So Charles Brown walks into a meeting of the Executive Committee, at which all members of the committee are not present, and says, "I am going to turn off the water unless I get \$7500; and if I get \$7500, I won't turn it off for three months hence."

Now when Mr. Harrah first took his position in this matter, he knew that under the terms of this contract there was a provision that the water could be turned off, that the pipes could be repossessed, the system could be torn out. [473] He knew that all down through the years. It wasn't any news to him.

I venture to say that if Mr. Darling or any representative of the Cruickshank Company or anybody except the one that Mr. Harrah was in league with had walked in with that demand, Mr. Harrah would literally have thrown him out of the office. He wouldn't have gotten a dime. But imagine—although Mr. Harrah knew that there were forces in this corporation that had been urging that this contract be purchased for the corporation for the nominal sum of \$10,000, notwithstanding the fact

the he knew all that, Mr. Harrah, with the assistance of Mr. Kinney, who permitted himself to be used in the matter, immediately wrote out a check for \$7500 and got not one single, solitary thing in writing from Mr. Brown to evidence the fact that they had at least three months grace in the situation. He just handed out \$7500 forthwith. And then, when Mr. Harrah knew that the day of reckoning finally had come, that his power as a member of the Executive Committee was to come to an end on the next day, again by a strange coincidence Mr. Charlie Brown sits down and writes out a demand dated November 6, 1944, which is in evidence here and is Bankrupt's Exhibit 4. Then, although Mr. Harrah knew that on the following day a meeting of the stockholders was to be held, nevertheless Mr. Harrah, again with the gracious assistance of Mr. Kinney, immediately writes out a check for \$30,000, and delivers it [474] the next day, November 8th. And they were in such a hurry to get that check cashed by the bank that the physical evidence here shows that that check was never even folded once, nobody even as much as put it in his pocket or in his purse or in his billfold. It was either delivered right at the banking house of the Security Bank itself or was taken poste-haste by Mr. Brown with it in his hand down to the bank in order to get it in his account or to cash it or to do whatever he did—I think he said he deposited it in his account.

So, if Mr. Harrah was not an interested party in this transaction, do you think that he would have forthwith paid that \$30,000? Certainly there would be every reason favoring his stalling the matter until the following day, until he could have placed the responsibility on the shoulders of the stockholders. No man would have assumed

that responsibility of paying out \$30,000, at least 75 per cent of all of the cash resources of that corporation at that time. And he would not have done it in view of his interest as a bondholder in the corporation.

The conclusion is inescapable that this is an unconscionable deal engineered by John Harrah. I am not convinced at all that Charles Brown has the slightest monetary interest in this transaction, and this notwithstanding the documentary evidence of a bank account in the name of Charles Brown.

We have a situation here which we find once in a while of [475] a man who got into financial difficulties and who sought relief from the bankruptcy court; and up to this moment, although some years have elapsed, he is not receiving that relief—he may still get it, I am not sure; but thus far and he does not know—and we find the traditional picture. He writes a check for \$3,000 and signs his name to it. But it is not his money. It is the money of his son, his close relative, who does business up in Reno, Nevada, on his own. It is elementary here in the bankruptcy court that those circumstances are suspicious circumstances. Here is Charles Brown, a very likeable gentleman, a nice man; but he does not give the impression that he is a man who would gamble \$10,000 of his own money on a contract upon which nothing had been paid for I do not know how long.

Mr. Davis: 1932, your Honor.

The Referee: Since 1932. Mind you, Charles Brown says he gave a cashier's check with his own money, \$10,000. Now we do not know what Charles Brown was worth, and I am not going to attempt to appraise his financial status. He says he bought it because he wanted some kind of a leverage against the corporation in the

matter of the continuation of his leases—he had the Slide lease and he had the Bridgo lease. Did Charles Brown gamble \$10,000 of his money that he could profit to that extent by buying this contract? I do not believe it. I think the thing is a Harrah deal first, last, and all the time. [476]

He took Mr. Gerety in with him. Yes, Mr. Gerety was very close in that. And I think there was good reason for Mr. Harrah's letting Mr. Gerety in on the deal in some manner. But Harrah was the one who engineered the thing, conceived it, carried it into execution, and personally profited by it. I haven't the slightest doubt of that situation. Referring again to this exhibit very briefly, it is interesting to note that in Bankrupt's Exhibit 4, Mr. Brown says, among other things, "I agree to not turn the water off in the system for a period of one year from this date, except that I may turn the water off at any time if the company is adjudged bankrupt or a receiver is appointed for the company or for the property covered by the trust indenture or if any of the present directors are removed or if the Executive Committee is changed or its powers restricted." That is what Mr. Charlie Brown said. Why he found it necessary to put it in there I do not know.

Now this court has full and ample and complete jurisdiction to settle this matter. An involuntary petition in bankruptcy was filed. It was contended that it cannot possibly result in an order of adjudication; that it is insufficient; that it is defective. But no collateral attack may be made on the involuntary proceeding. Whatever the petition says when it is filed, an involuntary petition is filed, the Court immediately acquires full and complete jurisdiction. Now that is not to the disadvantage of any-

body. If the petition [477] is defective, if it is not proper, the Court is always open to entertain a proper motion to dismiss or to require that it be amended or what not. For, as long as the petition remains undismissed, the Court has full and complete jurisdiction over the alleged bankrupt and his assets. Here is a transaction whereby, after the Court had acquired jurisdiction, the Executive Committee of this corporation undertook to pay out \$30,000 of the corporation's money. This Court has jurisdiction to determine the propriety of that disbursal.

The Court finds that it was not proper to the extent of \$22,500. The Court finds that all that Charles Brown may receive, as the nominal holder of this contract, is the total sum of \$15,000, the amount which was paid for it; that he already received \$7500 prior to bankruptcy; and that all that could be paid to him at the time the \$30,000 was paid was the sum of \$7500. That he is entitled to. The balance belongs to the bankrupt corporation. And the clerk will be directed to pay to Mr. Charles Brown the \$7500, the balance to be paid to whoever is the custodian of the assets of the alleged bankrupt—

Mr. Davis: That is the corporation, your Honor.

The Referee: That is the corporation, no receiver having been appointed?

Mr. Davis: That is right.

The Referee: (Continuing) —and that upon the payment of that \$7500 Charles Brown shall have no further claim [478] of any kind whatsoever against the corporation on account of this contract; that Edward A. Gerety shall have no claim against the corporation; that William Harrah shall have no claim against the corporation. William Harrah will have to settle with Charlie Brown. That deal was made after the \$30,000 deal, after

the \$30,000 was paid to Mr. Brown and before Mr. Brown paid it into court.

We are now determining, gentlemen, the propriety of that \$30,000 payment. It has been here in a state of suspension. We could determine that it was proper and order the holding of the \$30,000. We could determine no part of it was proper. We are now determining that to the extent of \$7500 it was proper, but that that extinguished all claims against the corporation. Consequently when some weeks later Mr. William Harrah paid \$3,000 through his father for an interest in the contract, he just acquired nothing. You gentlemen will of course exercise your own views as to the proper phraseology to be employed. I think I make myself clear: The \$7500 completely discharges the obligation of the corporation, and none of the parties to this proceedings can have any claim against the corporation on the contract. [479]

In the District Court of the United States
Southern District of California
Central Division

Before Hon. Benno M. Brink—Referee

State of California
County of Los Angeles—ss.

I, Clifton Clay, official reporter of the above-entitled court, do hereby certify that the foregoing pages 1 to 479, both inclusive (Vol. I and Vol. II), comprises a full, true, and correct transcript of the testimony offered or taken and all rulings, acts, and statements of the Court; also all objections or exceptions of counsel, and all matters to which the same relate, made during the progress of

said proceedings of July 24, July 25, July 26, and July 27, 1945, in re: Alleged Bankrupt versus Charles J. Brown, E. A. Gerety, William Harrah and John Harrah.

Dated this 29th day of August, 1945.

CLIFTON CLAY,
Official Reporter.

[Endorsed]: Filed Aug. 31, 1945. [480]

[Endorsed]: No. 11397. In the United States Circuit Court of Appeals for the Ninth Circuit. E. A. Gerety, William Harrah, Charles Brown and Harold Pool, Appellants, vs. Abbot Kinney Company, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed July 29, 1946.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 11397

United States Circuit Court of Appeals
for the Ninth Circuit

WILLIAM HARRAH, E. A. GERETY, CHARLES
BROWN,

Appellants,

v.

ABBOT KINNEY COMPANY, a corporation, Alleged
Bankrupt,

Respondent.

APPELLANTS' STATEMENT OF POINTS ON
WHICH THEY INTEND TO RELY ON THIS
APPEAL

To the Honorable Judges of the United States Circuit
Court of Appeals, for the Ninth Circuit:

Pursuant to the rules of this Court, William Harrah, E. A. Gerety, and Charles Brown, do hereby file with this Court the following concise statement of the points on which they intend to rely on this appeal.

I.

That the United States District Court had no jurisdiction to entertain the proceeding appealed from or to enter the order appealed from for the following reasons:

a. That no person qualified to file an involuntary petition in bankruptcy signed or joined in the involuntary petition.

b. That the amended involuntary petition does not state an act of bankruptcy.

c. That the alleged bankrupt, Abbot Kinney Company, had no legal right to institute the proceeding resulting in the order appealed from.

d. Where the parties stipulated in writing as to the procedure to be followed and the stipulation was approved by the Referee in Bankruptcy, it was error to permit a repudiation of the stipulation and proceed contrary thereto.

e. Where the involuntary petition in bankruptcy was dismissed, it was error not to dismiss summary proceedings instituted by the alleged bankrupt before the District Court against your petitioners.

f. The Referee erred in making the following findings of fact and the District Court erred in approving the same in respect to the following material facts:

1. That there was a fiduciary relationship between E. A. Gerety, John Harrah, William Harrah or Charles Brown in respect to Abbot Kinney Company and that the purchase by Charles Brown and E. A. Gerety of the Cruickshank contract was a violation of said fiduciary relationship.

2. That there was a conspiracy between E. A. Gerety, John Harrah, William Harrah and Charles Brown to defraud Abbot Kinney Company of the Cruickshank sprinkling contract.

3. That there was a conspiracy between E. A. Gerety, William Harrah and Charles Brown to have payments made upon said contract.

4. The Court erred in modifying the findings of the Referee and findings that Abbot Kinney Company had the opportunity of acquiring said sprinkling contract for the sum of \$10,000.00.

5. The Court erred in failing to find when said conspiracy arose and the period of time which the same existed.

6. The Court erred in finding that there was discretion in the District Court as a Court of Bankruptcy to entertain the petition and order to show cause which resulted in the order appealed from.

7. The Court erred in finding that the District Court was vested with jurisdiction to entertain a proceeding to determine title to property on the filing of a defective petition.

Dated this 22nd day of July, 1946.

LESLIE L. HEAP

D. M. KITZMILLER,

COBB & UTLEY

By Francis B. Cobb

Attorneys for Appellants

Received copy of the within Appellants' Statement, this 25th day of July, 1946. Grainger & Hunt, Attorneys for Respondent.

[Endorsed]: Filed Jul. 29, 1946. Paul P. O'Brien, Clerk.

No. 11397.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

ABBOT KINNEY COMPANY,

Alleged Bankrupt.

E. A. GERETY, WILLIAM HARRAH, CHARLES BROWN and
HAROLD POOL,

Appellants,

vs.

ABBOT KINNEY COMPANY,

Appellee.

APPELLANTS' OPENING BRIEF.

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Attorneys for Appellants.

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No. 11397.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

ABBOT KINNEY COMPANY,

Alleged Bankrupt.

E. A. GERETY, WILLIAM HARRAH, CHARLES BROWN and
HAROLD POOL,

Appellants,

vs.

ABBOT KINNEY COMPANY,

Appellee.

APPELLANTS' OPENING BRIEF.

Opinion Below.

The memorandum opinion of the court below is reported in 66 Federal Supplement 841 [R. 178].

Statement of Jurisdiction.

The United States District Court for the Southern District of California claimed and asserted jurisdiction over the parties and the subject matter by reason of an amended involuntary petition in bankruptcy filed by three alleged creditors against Abbot Kinney Company [R. 5]. See Title 11, Chapter 2, Section 11, United States Code, Annotated.

This court has jurisdiction by reason of Section 24, subdivision (a) of the Bankruptcy Act, Title 11, Chapter 4, Section 47, United States Code, Annotated, page 360.

Statement of Case and Questions Presented.

The questions involved and the manner in which they were raised are:

First Question: Whether three bond holders who did not waive their security, may file an involuntary petition in bankruptcy, particularly where because of the running of the Statute of Limitations the holders of the bonds lost all right to maintain any proceeding for a deficiency judgment and where their rights were only to foreclose on the real property which was security for the bond issue and then only to proceed in concert by action of the trustee for and on behalf of all bond holders?

The question is raised by the amended involuntary petition [R. 5], the answer of the alleged bankrupt [R. 141] and the objection to jurisdiction [R. 42 and 43].

Second Question: On the filing of a defective involuntary petition, may the alleged bankrupt institute proceedings to determine the validity of a conditional sales contract and to establish a trust in respect thereto over the objection to jurisdiction by the holder of said contract? This question is raised by the petition for order to show cause [R. 17], objections by appellants [R. 42 and 43] and answer of appellants [R. 31, 35, 39].

Third Question: Where parties to a proceeding stipulate and the stipulation is approved by the court, may the court over the objection depart from the approved stipulation when the objection is raised by answers of appellants herein? [R. 31, 35, 39; Stipulation, R. 167.]

Fourth Question: Where the involuntary petition in bankruptcy was dismissed, was it error not to dismiss a summary proceeding instituted by the alleged bankrupt against the appellants herein over their objection to the jurisdiction of the District Court? This point is raised by motion for dismissal [R. 145], memorandum order of the District Court [R. 178] and the order appealed from [R. 185].

Fifth Question: Did the court err in denying a creditor the right to intervene and in not granting the motion to dismiss? This point is raised by petition [R. 131], motion [R. 139] and Points and Authorities [R. 174].

Sixth Question: Did the Referee err in making findings of fact that were made and did the District Court err in approving the same on review, where said facts were contrary to the evidence and not supported by the evidence? This point was raised by petition for review [R. 45], Referee's findings [R. 61], transcript [R. 196] and the order appealed from [R. 185].

Seventh Question: Was it error for the District Court upon its own motion and contrary to the evidence, to modify the Referee's order that the appellants were entitled to be reimbursed or credited with \$15,000.00, the purchase price of a conditional sales contract and to find and order that the appellants be reimbursed only in the sum of \$10,000.00, where such finding and judgment is based on the fact that one year previous to the purchase of the conditional sales contract by the appellants, the said contract was offered to the appellee for \$10,000.00? [R. 185].

Statutes Involved.

The applicable statutes are set forth in the Appendix, *infra*, pages 1 to 3.

Statement of Facts.

The Abbot Kinney Company, a corporation, on the 1st day of April, 1931, executed a trust indenture securing a bond issue of \$350,000.00, first mortgage bonds, under which bond indenture the California Trust Company was made trustee for the owners and holders of the outstanding bonds and was vested with the right to act for all bond holders [R. 585, 588].

By reason of the Statute of Limitations, Section 336a, subdivisions 1 and 2, of the Code of Civil Procedure of the State of California, there was no right at the time of the filing of the involuntary petition for the bond holders to proceed against the Abbot Kinney Company for any deficiency judgment and the bond holders only had the right to act through the trustee to foreclose on the property secured by the trust deed [R. 143, 379].

On the 2nd day of June, 1931, the said company had installed a sprinkler system on its pier at Venice, California, under a conditional sales contract, whereby F. R. Cruickshank & Company held the legal title to said contract until installments therein provided were paid to them. The Statute of Limitations was extended from time to time on the said contract, and on June 13, 1944, appellants Brown and Gerety purchased the same from the Cruickshank Company for the sum of \$15,000.00. At the time of the purchase there was due on the contract the sum of \$137,181.30 [R. 65, 110].

For a number of years prior to June, 1944, a controversy existed between the bond holders and their representatives and two groups of common stock holders of the Abbot Kinney Company in respect to the control of the company and its operations. One stockholders' group was headed by Al Newton, Phillip Davis, one of the attorneys of record, and his brother and father. The bond holders' group was represented by John Harrah, Frank Williams and Lewis Halper; and the other stockholder's group was represented by Carlton Kinney and Helen Kinney Ward.

During a portion of this period, certain amusement concessions were leased and operated by appellant Charles Brown, and the Abbot Kinney interests at the pier were managed by Ed Gerety, and the board of directors functioned through an executive committee which was composed of Carlton Kinney, Al Newton and John Harrah [R. 325, 421].

During 1943 there were negotiations between the Davis group with the Cruickshank Company to acquire, at a discount, the conditional sales contract covering the sprinkler system which was an important improvement in connection with the pier operations. This group was negotiating to purchase the contract for themselves and had received an offer from the Cruickshank Company to sell the contract for \$10,000.00. No offer was made in 1943 or at any other time directly to the Abbot Kinney Company for it to purchase the contract [Darling's testimony, R. 392]. However, on the day the option of the Davis group expired, one of their members offered the contract to the corporation for \$10,000.00 [R. 393], but the executive committee and bond holders group were opposed to the

use of any money to acquire the said contract [R. 321, 389] at this particular time because the corporation didn't have \$10,000.00 available to buy the contract and furthermore, it needed the available funds to pay delinquent taxes [R. 493]. After January 1943 to about April 1944, the contract which previously had been offered to various groups for prices ranging from \$25,000.00 to \$50,000.00, was sought by Lewis Halper, the Davis group, a concessionaire named Phillips, but no sale of it was made [R. 399]. In May 1943, there was an abortive attempt to change the executive committee of the company by the Davis group and Charles Brown and Ed Gerety were notified that they were removed from their connection with the company [R. 242, 327, 338]. Thereafter, Gerety and Brown, commencing about June 6, 1944, negotiated with the Cruickshank Company [R. 242] and succeeded in purchasing the conditional sales contract on or about June 13, 1944. Title was taken in the name of Brown [R. 249]. Demand was made upon the corporation for payment of \$7,500.00 to keep the contract in force for ninety days which sum was paid by the executive committee. Thereafter and at the expiration of the ninety days, demand was made for payment of the \$30,000.00 annual installment due under said contract, and in the demand it was proposed to credit the company with \$50,000.00 if this installment was paid. About the time of that demand, the Davis group called a stockholders' meeting for the election of a new board of directors, and on the date of said meeting said sum of

\$30,000.00 was paid upon the contract, and this payment was after the filing of the involuntary petition in bankruptcy [R. 346, 348, 499].

Said involuntary petition was filed in the United States District Court by three bond holders [see R. 2 to 4, incl.] alleging that the payment of \$7,500.00 was payment on an antecedent debt and constituted a preference and an act of bankruptcy [R. 4]. That petition was later amended without material change [R. 5 to 7, incl.]. An answer was filed to said involuntary petition [R. 8 and 9, incl.].

A petition for order to show cause was filed by the alleged bankrupt and an order to show cause was issued thereon and served upon the appellants herein [R. 17]. Thereupon, the parties entered into a stipulation [R. 25, 167], by which the \$30,000.00 paid by the Abbot Kinney Company to Brown and Gerety would be deposited with the clerk of the court *to await the determination of whether or not the company would be adjudged a bankrupt*. The agreement further provided for expediting the hearing on the bankruptcy petition. *The court approved the stipulation* on January 9, 1945 [R. 171] and dismissed the order to show cause. Reference was made to a referee to determine the issues raised by the amended involuntary petition and amended answer thereto, and the same was set for hearing on the 17th day of July, 1945 [R. 207]. *Prior to that hearing and in violation of said stipulation*, a petition [R. 17] and order to show cause [R. 29] was filed to have the court *determine title to the*

sprinkler contract and to the \$30,000.00 on deposit with the court. This petition and order to show cause were returnable on July 16, 1945. Respondents under that order, the appellants herein, objected to the jurisdiction of the court [R. 43, 199], and on the ground that it was contrary to the approved stipulation. That objection was overruled and answers were filed and respondents were forced to a hearing on that order. Following the hearing the Referee entered findings of fact and conclusions of law and an order determining the title to said sprinkler contract to be in the corporation, and that the corporation owned the \$30,000.00 less the amount paid by Brown and Gerety, to-wit, \$15,000.00 [R. 61-79], and less the \$7,500.00 paid in June 1944. The appellants herein petitioned the District Court to review the order of the Referee [R. 45] and on review the District Judge required the Referee to hear and determine the involuntary petition and the issues raised therefrom [R. 144] and the Referee found that the same should be dismissed [R. 178]. Thereafter the District Judge entered the order appealed from herein [R. 185]. Appellant appealed from the order of the District Court under Section 24, subdivision (a) of the Bankruptcy Act, Title 11, Sec. 47, United States Code, Annotated, p. 360 [R. 193].

Statement of Points to Be Urged.

1. The District Court had no jurisdiction to entertain the Summary Proceedings resulting in the order appealed from.
2. No persons qualified to file an involuntary proceeding signed or joined in the involuntary petition.
3. The involuntary petition does not state an act of bankruptcy.
4. The alleged bankrupt cannot institute proceedings to recover a preference and to quiet title and to establish a trust against an adverse claimant prior to adjudication.
5. Where the parties to a stipulated procedure to be followed and the Referee approved that stipulation, it is error to permit a repudiation of the stipulation.
6. Where involuntary petition was dismissed, it was error not to dismiss summary proceedings instituted by the alleged bankrupt.
7. The court erred in denying a creditor the right to intervene and in not granting the motion to dismiss.
8. The Referee erred in making findings of fact and conclusions of law which are not supported by or sustained by the evidence and the District Court erred in approving the same.
9. The District Court, on its own motion and contrary to the evidence, modified the Referee's order, by reducing the reimbursement figure from \$15,000 to \$10,000. This was error.

ARGUMENT.

I.

The District Court Had No Jurisdiction to Entertain the Summary Proceedings Resulting in the Order Appealed From.

Appellant contends that the United States District Court had no jurisdiction in respect to the proceedings appealed from for the following reasons:

(a) That *no person or creditor qualified* to file an involuntary proceeding, as required by the Bankruptcy Act, as amended, *was a party to said amended involuntary petition.*

(b) That the amended involuntary petition does not state an act of bankruptcy.

(c) That the alleged bankrupt is not vested by the statute with the authority to institute a proceeding *to recover a preference and to quiet title and establish a trust* against adverse claimants *prior to an adjudication.*

(d) That the controversy was a subject matter of a plenary action that would have had to be instituted in the state courts.

NO PERSONS QUALIFIED TO FILE AN INVOLUNTARY PROCEEDING HAVE SIGNED OR JOINED IN THE INVOLUNTARY PETITION.

Under the 1938 amendment to the Chandler Act, Section 59 (U. S. C. A., Title 11, Chap. 6, Sec. 95), it is provided:

“Who may file and dismiss petitions. a. Any qualified person may file a petition to be adjudged a voluntary bankrupt.

b. Three or more creditors who have *provable claims fixed as to liability* and *liquidated as to amount* against any person which amount in the aggregate in excess of the value of securities held by them, if any, to \$500 or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt."

Section 1.11, U. S. C., Title 11, Chap. 1, Sec. 1.11, defines a creditor as:

" 'Creditor' shall include anyone who owns a debt, demand, or claim provable in bankruptcy"

Section 1.14 defines "debt" as:

" 'Debt' shall include any debt, demand or claim provable in bankruptcy."

Claims provable in bankruptcy are defined in Section 57, Subs. a to n, of the Bankruptcy Act (U. S. C., Title 11, Chap. 6, Sec. 93). Subdivision d provides:

"Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion. Provided, however, that an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this Act."

Subdivision e provides:

“Claims of secured creditors and those who have priority may be temporarily allowed to enable such creditors to participate in the proceedings at creditors’ meetings held prior to the determination of the value of their securities or priorities, but shall be thus temporarily allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.”

This question has been passed upon by the 7th Circuit Court in the case of *Central Illinois v. Flori Pipe Co.*, 133 F. (2d) 657, 660, as follows:

“Since the amendment of 1938, it is doubtful if a single creditor whose claim is secured, even though the debt greatly exceeds the security, may qualify as one who can file an involuntary petition in bankruptcy without giving up his security. The Act, 11 U. S. C. A., sec. 95, requires that petitioner’s claim be ‘fixed as to liability and liquidated as to amount.’ Inasmuch as a secured creditor has a petitioning claim only for the difference between the amount of the debt and the value of the security, his claim is not liquidated. He therefore must fail to measure up to the qualifications of a petitioning creditor in an involuntary petition unless he waive his security.”

Remington states the rule, Sec. 254, 1944 Supp., p. 104:

“Nevertheless, the statement in the text, to the effect that contingent claims are not sufficient for petitioning creditors’ claims, still is correct law. This is because Sec. 59b, as amended, by the Act of 1938, 11 U. S. C. A., Sec. 95b, requires not only that the

claims of the petitioning creditor be provable, but further requires that such claims be 'fixed as to liability and liquidated as to amount.' See the discussion in Sec. 211.10, of this treatise, *ante*."

against 1944 Supp., p. 94, Sec. 211.10,

"The Amendatory Act of June 22, 1938, amended Sec. 59b, 11 U. S. C. A., Sec. 95b, of the Bankruptcy Act, so as to require that the claims of the petitioning creditors be 'fixed as to liability and liquidated as to amount.'

"This new requirement obviates the necessity of passing upon and determining the amount of such claims at the inception of the proceeding."

The petitioning creditors as the owners of a few of the bonds out of the entire issue were not creditors under Section 1.11 since they did not "own a debt . . . provable in bankruptcy. The obligation of the Abbot Kinney Company is set forth in the Trust Indenture, as follows [R. 585]:

"All rights of action on or because of the bonds issued hereunder or the interest coupons thereto appertaining and all rights of action under this Indenture are hereby expressly declared to be vested exclusively in the Trustee, except only as hereinafter provided; (447) and such rights may be enforced by the Trustee without the possession of any of the bonds issued hereunder or the interest coupons thereto pertaining. Any suit or proceeding instituted for the Trustee shall be brought in its name as Trustee, and any recovery or judgment shall be for the pro rata benefit of the bonds issued hereunder and the interest coupons thereto appertaining." [R. 379, 585.]

The right to take action against the Abbot Kinney Company was vested in the trustee under the Trust Indenture. *The three petitioning creditors owned no debt they could prove or use to file an involuntary proceeding in bankruptcy.* The amended involuntary petition shows *on its face* the nature of their position [R. 6, Par. 5]. The petitioning creditors' amended petition recites [R. 6, last line]:

"That your petitioners *do not waive the security* for said bonds." (Italics ours.)

It is necessary in order to invoke the jurisdiction of the bankruptcy court, that the facts required by statute be alleged in the petition. An order of adjudication is void if these facts are lacking. The rule is stated in Remington on Bankruptcy, Vol. 1, 1945 Supp., Sec. 518, p. 201:

"An involuntary petition is jurisdictionally defective if it fails to disclose the commission of an Act of bankruptcy. Such defect is sufficient ground for vacating adjudication. Where the defect appears affirmatively from the pleadings, the decree of adjudication is a nullity. Any creditor having a provable claim who is not estopped or guilty of laches, may attack the adjudication on the ground of lack of jurisdiction. It is the duty of the bankruptcy court *sua sponte* to dismiss the petition at any state of the proceedings where it is clear that the petition is jurisdictionally defective. The bankruptcy court has no terms but sits continuously and the rule which prohibits the vacating of judgments in a term subsequent to that in which they were entered is not applicable. The defect cannot be cured by amendment because the amendment could only become effective as of the date of application therefor."

Also:

In re Crafts Riordan Shoe, 26 A. B. R. 449, 185 Fed. 931;

In re Farthing, 29 A. B. R. 732, 202 Fed. 557.

The defects of the petition were raised and urged throughout the proceeding [R. 202, 42, 43, 145].

A direct motion was made on this ground and on the authorities submitted here [See R. 145 to 148].

THE INVOLUNTARY PETITION DOES NOT STATE AN ACT OF BANKRUPTCY.

It is alleged in Paragraph 6 [R. 7] of the amended petition that the alleged bankrupt paid out of its assets to Charles Brown, *et al.*, "The sum of \$7,500.00 on an antecedent debt due them by Abbot Kinney Company, which payment was made for the purpose and with the intent of preferring said Charles Brown, *et al.*, over the other creditors of said Abbot Kinney Company."

This allegation is insufficient to constitute an act of bankruptcy in that it *does not allege or show* that the parties receiving the payment were *unsecured creditors* or that they were in the *same class as the petitioning creditors* or that there were *any other creditors in the same class* as the parties receiving the payment.

If Charles Brown had a valid mortgage or conditional sales contract and payment could be made to him as alleged in the petition, the same would not constitute a voidable preference.

Remington, Vol. 5, Sec. 2289, p. 444, states:

"Each element of the preference must be alleged and proved."

The elements constituting a preference are (Remington, Vol. 4A, Sec. 1657, pp. 91 and 92]:

“Upon analysis it will be found that the provisions in Sec. 60, 11 U. S. C. A., Sec. 96, which define a voidable preference, may be conveniently discussed in five groups. These groups of provisions may be termed the elements of a voidable preference. They will be referred to by number and by a descriptive word or phrase.

First Element: A Transfer on an Antecedent Debt. ‘A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt made or suffered by such debtor.’ Subdivision (A), Sec. 60, 11 U. S. C. A., Sec. 96, first sentence in part.

Second Element: A Transfer Made by an Insolvent Debtor. ‘A transfer . . . made . . . by such debtor while insolvent.’ Subdivision (a), Sec. 60, 11 U. S. C. A., Sec. 96, first sentence.

Third Element: A Transfer Made within Four Months before Bankruptcy. ‘A preference is a transfer . . . made . . . within four months before the filing by or against him of the petition in bankruptcy, or of the original petition under chapter X, XI, XII, or XIII of this Act. . . . For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no *bona-fide* purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee, therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy or of

the original petition under chapter X, XI, XII, or or XIII of this Act, it shall be deemed to have been made immediately before bankruptcy.' Subdivision (a), Sec. 60, 11 U. S. C. A., Sec. 96, first sentence in part.

Fourth Element: A Transfer Resulting in an Advantage to a Creditor. 'A transfer . . . the effect of which . . . will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.' Subdivision (a), Sec. 60, 11 U. S. C. A., Sec. 96, first sentence in part.

'When the word "preference" alone is used, it refers to a transfer characterized by the first four elements: (1) Transfer to a creditor on an antecedent debt (2) made while the debtor is insolvent, (3) having the effect of giving that creditor a greater percentage in bankruptcy than other creditors of the same class, and (4) the making of the transfer within four months of bankruptcy.'

Fifth Element: Reasonable Cause for Creditor to Believe the Debtor Is Insolvent. 'Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent.' Subdivision (b), Sec. 60, 11 U. S. C. A., Sec. 96, first sentence.

'When the term "voidable preference" is used in this chapter, it means a transaction which has all five elements or characteristics. If any element is missing, a transaction cannot result in a voidable preference.' "

Remington, Vol. 4A, Sec. 1701, p. 209, discussing the fourth element, states the rule:

“Who Are Creditors of the Same Class. It was ruled in an early case of the eighth circuit which has been universally followed that the classes referred to are the classes in which creditors are grouped by Sec. 64, 11 U. S. C. A., Sec. 104, for the purpose of priority in distribution.

In re Star Spring Bed Co., 257 F. 176, 43 A. B. R. 328 (1919; C. C. A. N. J.), (affirmed in 265 F. 133, 45 A. B. R. 650), Davis, District Judge: ‘The referee further states that

“A point not argued, but appearing to me to be decisive of this case, is that one essential element of a voidable preferential transfer is entirely lacking that is, the effect of the transfer must be to enable the creditor to obtain a greater percentage of his debt than other creditors of the same class. . . . Here, however, is a creditor holding security who surrenders it and receives other security. What creditors ‘of the same class’ are there over whom he has acquired a preference? There is no proof that there were any.” ” ”

It is *essential that an act of bankruptcy be alleged* or there is no jurisdiction. The rule is stated in Remington, Vol. 1, Sec. 107, p. 158, as follows:

“But involuntary bankruptcy must be based on the commission of an act of bankruptcy, and what constitutes such act is prescribed by statute.

Not even every person nor corporation nor partnership included in the various classes heretofore considered as being subject to involuntary bankruptcy, may be forced into bankruptcy. Other con-

ditions must also, at the same time, exist. Such person or corporation or partnership must have committed what is termed an act of bankruptcy.

The Bankruptcy Act was not intended to cover all cases of insolvency, but only such cases as are within its provisions.

Thus, the mere fact that an individual or copartnership refuses or is unable to pay his or its debts is not an act of bankruptcy.

And the statute specifies what acts constitute acts of bankruptcy."

II.

The Alleged Bankrupt Cannot Institute Proceedings to Recover a Preference and to Quiet Title and to Establish a Trust Against an Adverse Claimant Prior to an Adjudication.

The right to institute actions against adverse claimants is founded on Section 23 of the Bankruptcy Act, and *that act limits the rights to the receiver and the trustee.*

Section 23b provides:

"Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in Sections 60, 67 and 70 of this Act."

Section 60 defines preferences and Subdivision b provides for their avoidance by the trustee. Courts have unanimously held only trustee may bring proceeding to set aside transfer, Remington, Vol. 4A, Sec. 1715, p. 267:

"Trustee's Rights in Respect of Voidable Preferences. A preferential transfer is voidable only in a

proceeding by the trustee. The trustee cannot sell his right to avoid a transfer under subdivision (b).” See *Belding-Hall Mfg. Co. v. Mercer & F. Lumber Co.*, 175 Fed. 335, 23 A. B. R. 595, and *Webster v. Barnes Bkg. Co.*, 113 F. (2d) 1003, 43 A. B. R. (N. S.) 613.

“Preferences under Sec. 60, 11 U. S. C. A., Sec. 96, given by a corporation are not voidable by its stockholders if the estate is sufficient to pay general creditors. Creditors cannot sue to set aside voidable preferences.”

Section 67 relates to voidable liens, while the Act uses the term “void.” This court has held the term means “voidable.” See *W. S. Pigg & Son v. U. S.*, 81 F. (2d) 334. Trustee is given the right to preserve transfer for benefit of the estate.

Section 67, Subdivision 4, confers upon the trustee or debtor.

Sec. 70, Subd. a, provides that the trustee shall be vested by operation of law, and then follows the vesting of rights in the trustee to property fraudulently transferred, etc.

None of these sections confers upon the alleged bankrupt the right to sue adverse claimants upon actions which prior to bankruptcy would require trial in the State Court.

Prior to the amendment of 1938 a receiver was not named in the Act as being entitled to prosecute actions, and this court in the case of *Stanton v. Busch*, 59 F. (2d) 668, 669 (9th C. C. A.), held only the trustee could

bring the proceeding and the court could not confer jurisdiction:

“The court jurisdiction was limited to appointment after first finding it absolutely necessary to conserve the estate, and the power of the receiver to hold the property was limited to the qualification of the trustee. The property came into *custodia legis* when the petition was filed, and the ancillary receiver was only the custodian to hold it until the trustee qualified. *Cameron v. United States*, 231 U. S. 710, 34 S. Ct. 244, 58 L. Ed. 448. Upon qualification of the trustee, the title vested in the trustee. *Mueller v. Nugent*, 184 U. S. 1, 14, 22 S. Ct. 269, 46 L. Ed. 405. This obtains whether the estate may be located within or without the district. *Robertson v. Howard*, 229 U. S. 254, 33 S. Ct. 854, 57 L. Ed. 1174. The jurisdiction of the bankrupt estate was and is exclusive in the court of the Northern District. *Isaacs v. Hobbs Tie & T. Co.*, 282 U. S. 734, 736, 51 S. Ct. 270, 75 L. Ed. 645.”

“A bankruptcy receiver is purely statutory, and his power is limited by the statute. He has no power, nor can a court by order confer power, to adjudicate the right of lien claimants. *Boonville Nat. Bank v. Blakey* (C. C. A.) 107 F. 891. See, also, *In re National Grain Corporation* (C. C. A.) 299 F. 597.”

Also:

In re Cox Baking Company, 77 F. (2d) 294.

Congress, in giving the receiver practically the same powers as possessed by the trustee, *did not* see fit to *include*

the alleged bankrupt, and the reason for the rule is quite clear. If there is an adjudication the trustee should institute the litigation and possesses the powers of a creditor holding an execution returned *nulla bona*, as well as the rights of the bankrupt. *The alleged bankrupt should not be permitted to prosecute litigation before the appointment of the trustee*, nor can it have determined controversies with third parties in the court and under the rules that follow upon an adjudication and the bankruptcy court taking over the administration of the estate.

As pointed out by the court in *In re Vancouver Book & Stationery Co., Inc.*, 46 Fed. Supp. 799, preference is valid as against the alleged bankrupt, and it is only *after an adjudication and the appointment of the trustee* that a transfer creating a preference is subject to attack, and if the bankruptcy proceeding is later dismissed the creditor receiving the preference is required to be restored to his original position. At page 800 the court states:

“It was long ago held that the surrender of the preference necessary to qualify a petitioning creditor could not properly be made to the debtor, *In re Currier*, Fed. Cas. No. 3492. Stated in another way, such surrender can be properly made only to or for the trustee for the creditors, Gilbert’s *Colier on Bankruptcy*, 4th Ed., page 780, Sec. 1058. In all respects concerning preferences and requiring surrender of them, the court under the bankruptcy law favors only the creditors. The creditor who has received a preference and the court have no object to effect a repayment to the debtor of the preference and are not required to do so. *In re McGuire*, Fed. Cas. No. 8813.

“In this case, therefore, the debtor has no interest in the preference surrendered to the court by the petitioning creditors and the debtor has no interest which will support a claim of lien by the debtor’s attorney. The creditors, other than the petitioning creditors who surrendered the preference, have no remedy in this court for any claim upon the surrendered preference because the jury’s verdict defeats the jurisdiction of this court to grant creditor relief.”

Where a question of *jurisdiction* is raised in connection with a bankruptcy proceeding, *all proceedings* should be stayed and the question of *jurisdiction* determined by the judge, as distinguished from the referee. (See *Woolf v. Reeves*, 65 F. (2d) 80, 81-82.)

The rule has also been stated in *In re Pacific States Savings & Loan Co.*, 27 Fed. Supp. 1009, 1012, by Judge of this court, as follows:

“When jurisdiction is challenged, the court’s duty to inquire into its right to entertain the proceeding is imperative. And he who invokes the court’s power must show that he is properly before it. See *KVOS, Inc. v. Associated Press*, 1936, 299 U. S. 269, 57 S. Ct. 197, 81 L. Ed. 183; *McNutt v. General Motors Acceptance Corp.*, 1936, 298 U. S. 178, 56 S. Ct. 780, 80 L. Ed. 1135; *Bullard v. City of Cisco*, 1933, 290 U. S. 179, 54 S. Ct. 177, 78 L. Ed. 254, 93 A. L. R. 141; *Saint Paul Mercury Indemnity Co. v. Red Cab Co.*, 1938, 303 U. S. 283, 58 S. Ct. 586, 82 L. Ed. 845; *Zicos v. Dickmann et al.*, 1938, 8 Cir., 98 F. 2d 347; *Allen v. Clark*, 1938, D. C., 22 F. Supp. 898.”

III.

Where the Parties Stipulated as to Procedure to Be Followed and the Referee Approved That Stipulation, It Is Error to Permit a Repudiation of the Stipulation.

The \$30,000.00 found to be in the possession of the Bankruptcy Court was placed there by an adverse claimant under a stipulation executed by the alleged bankrupt and the petitioning creditors through their attorneys of record, the adverse claimants' attorney of record also executed the stipulation and the Referee in Bankruptcy thereafter approved the same.

This stipulation is a part of the record here [R. 167 to 171] and it is clear from the reading of the same that the parties intended and stipulated in clear language that the \$30,000.00 was to be held *until first the question of whether the Abbot Kinney Company was a bankrupt was determined*. The petitioning creditors and the alleged bankrupt stipulated that that question would be *determined with expedition*; stipulation further provided for the dismissal of a proceeding against Charles Brown to recover the \$30,000.00. *In violation of the stipulation*, the alleged bankrupt brought on a proceeding to determine the *title* to the \$30,000.00, and in further violation of the stipulation, consented to a continuance and delayed the determination of whether the involuntary petition should be dismissed. This flagrant violation of the agreement of the parties between themselves and with the court has been sanctioned by the Referee and the District Court. If this policy is

to be pursued in the future, the sanctity of an agreement between counsel and with the court will be seriously impaired. [See R. 167, 169.]

The District Judge recognized this requirement. See his order of December 14, 1945. [R. 144.]

“This is a review of the order made and entered by Referee Benno M. Brink, dated August 23, 1945.

“The matter will be held under submission and in abeyance until there is filed with the court findings and report of the referee in bankruptcy, Benno M. Brink, as special master. When the court is in possession of these facts, the issues involved in the voluntary petition in bankruptcy and the answer thereto, the court will be in a better position to act.

“The files show clearly that the petitioning creditors and alleged bankrupt have stipulated under date of January 8, 1945 that the said issues would be prosecuted with due diligence. The court made an order wherein the issues presented by the involuntary petition and the answer were referred to Benno M. Brink, referee, for hearing and report as special master on July 24, 1945. The court is not advised the cause of this long delay. The attention of the special master is called to Rule 53 D (1) of Federal Rules of Civil Procedure: ‘It is the duty of the Master to proceed with all reasonable diligence.’

“It Is Therefore Ordered that the said special master proceed with the hearing of said controversy heretofore referred to him by order dated July 24, 1945.

“Dated December 14, 1945.

J. F. T. O’CONNOR
Judge.”

The District Judge again stated in his opinion of May 27, 1946 [R. 182] as follows:

“The court could assume or reject the jurisdiction herein exercised. *In view of the agreement of the parties*, and in view of the spirit and provisions of the Bankruptcy Act, the contested involuntary petition in bankruptcy *should have been expeditiously disposed of and every collateral matter deferred*, if possible, and relegated to the other courts after the dismissal of the involuntary petition—but we have had a most thorough and complete trial of the controversy. The records show most extensive presentation, examination and cross-examination of witnesses, production of documents, and the Referee’s findings are extensive and complete.”

Orderly procedure would require that the question of whether the Abbot Kinney Company should be adjudged a bankrupt, and its affairs administered by the Bankruptcy Court, through the Court’s representative, a trustee in bankruptcy, elected and appointed as provided by law, be *first determined* if the company was a bankrupt. The court’s time and offices should not be used to permit the litigation of a controversy that the Federal Courts have *no jurisdiction to determine*. If the company be adjudged a bankrupt, the suit should be prosecuted under the Bankruptcy Act by the parties and as provided by law, and as we have shown above, that party is a receiver or trustee in bankruptcy and not the alleged bankrupt.

The reason for the above rules of procedure are quite clear and a dangerous precedent will be established if departure be permitted. For example, the alleged bankrupt institutes a proceeding to have a constructive trust established or in connection with a contract and if unsuccessful, later if there is an adjudication, the trustee would have the duty and right to institute the same proceeding and subject the adverse claimant to a multiplicity of actions. A further example, would be where it involves a conditional sales contract that the trustee might elect to reject, as he is given the power so to do, again, the litigation would be fruitless. A further example would be by filing an improper involuntary petition by persons not entitled to file the same as was done in the case at bar; the Federal Court would be used to determine, in a summary manner, before a Referee in Bankruptcy, a controversy that the respondents are entitled under the Constitution and decisions to have determined by the State Courts in accordance with State Court procedure including among other rights, the right of a trial by Jury.

Appellants *throughout the proceeding urged these fundamental principles*, and at the commencement thereof, filed a written objection to the court proceeding. The Referee has seen fit to proceed with the hearing of the controversy, and postponing the hearing of a matter which Congress has specifically stated must be heard with expedition. (See Section 18, Subdivision d of the Bankruptcy Act.)

IV.

**Where Involuntary Petition Was Dismissed, It Was
Error Not to Dismiss Summary Proceedings In-
stituted by the Alleged Bankrupt.**

The issues raised by the amended petition and the amended answer in respect thereto were heard and the special master reported to the District Judge, recommending that the involuntary proceeding be dismissed. [R. 151.] A motion to dismiss the involuntary petition was likewise made by Harold B. Pool. [R. 145.] The District Judge approved the report of the special master and dismissed the proceeding. [See R. 178.] All matters were heard and form a part of the judge's memorandum order of May 27, 1946. [R. 178 to 184.] The dismissal of an involuntary proceeding carries with it all pending proceedings. (Remington Vol. 1, Sec. 493, p. 610; Supp. 45, p. 192.)

In re McGuire, Fed. Cas. No. 8813;

In re Vancouver Book & Stationery Co., Inc., 46
Fed. Supp. 799.

As stated in the latter case:

"The creditors, other than the petitioning creditors who surrendered the preference, have no remedy in this court for any claim upon the surrendered preference because the jury's verdict defeats the jurisdiction of this court to grant creditor relief."

We respectfully submit that when the District Court dismissed the involuntary proceedings that said dismissal

effected a dismissal of *all proceedings* including the order appealed from herein, and under the stipulation approved by the court [R. 167], the court erred in not granting appellants' motion to dismiss the entire proceeding relating to the order to show cause and the order of the Referee and leave the parties to litigate their controversy before a court of competent jurisdiction.

V.

The Court Erred in Denying a Creditor the Right to Intervene and in Not Granting the Motion to Dismiss.

The petition to intervene to oppose the amended involuntary petition was filed July 18, 1945 [R. 131] and motion was made for an order permitting Harold Pool, as a creditor, and John Harrah, a director, to intervene. [R. 139.] Points and authorities in support of motion. [R. 174.]

This motion and the points and authorities sought to raise the legal insufficiency of the involuntary petition and the relationship between the attorney for the petitioning creditors and the alleged bankrupt, and would have permitted an early determination of the jurisdictional question instead of permitting it to be postponed until the order to show cause was determined.

The referee denied the motion. [R. 199, 200, 201.]

Appellant Harold Pool moved the District Court to dismiss the involuntary petition. [R. 145.]

The points and authorities [R. 146] raise the defects of the amended involuntary petition. The District Judge took the motion under submission. All matters were disposed of by his memorandum order of May 27, 1946 [R. 178] and the written order appealed from. [R. 185.]

It is clear from the above record that the petitioning creditors and the alleged bankrupt from October 21, 1944 to May 27, 1946, tried to evade a determination of the defective petition, and that this course of conduct met with the approval of the Referee. This strategy was to force a trial in a court that had no jurisdiction and have determined a controversy that should have been determined in some other court.

The District Court's conclusion that the petition should have been dismissed before the hearing on the order to show cause is clearly the law, his conclusion that, because appellants were erroneously forced to try the matter before the Referee, was no ground to upset the judgment, is, we submit, not the law.

The petition of Appellant Pool to intervene as a party in interest and have done what the bankruptcy act requires, was not permitted and the same was a reversible error. (See Bankruptcy Act, Section 18 (U. S. C., Title 11, Chap. 4, Sec. 41, Subd. d).)

“If a party entitled to appear and plead shall appear, within the time limited, and controvert the facts alleged in the petition, the court shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury except in cases where a jury trial is given by this Act, and make the adjudication or dismiss the petition.”

VI.

The Referee Erred in Making the Following Findings of Fact and the District Court Erred in Approving the Same in Respect to the Following Material Facts:

1. That there was a fiduciary relationship between E. A. Gerety, John Harrah, William Harrah or Charles Brown and the Abbot Kinney Company and that the purchase by Charles Brown and E. A. Gerety of the Cruickshank contract was a violation of that fiduciary relationship.

2. That there was a conspiracy between E. A. Gerety, John Harrah, William Harrah and Charles Brown to defraud Abbot Kinney Company of the Cruickshank sprinkling contract.

3. That there was a conspiracy between E. A. Gerety, William Harrah and Charles Brown to have payments made upon said contract.

4. The court erred in modifying the findings of the Referee and in finding that Abbot Kinney Company had the opportunity of acquiring said sprinkling contract for the sum of \$10,000.00.

The Referee found and the District Court approved and adopted, among others, the following: Sometime prior to the 13th of June, 1944, at the instance and instigation of John Harrah, an unconscionable conspiracy was knowingly, wilfully, and fraudulently entered into between John Harrah, William Harrah, Charles Brown, and E. A. Gerety to defraud and cheat the Abbot Kinney Company by having the executive committee refuse to purchase the

conditional sales contract, but to have Brown, as undisclosed agent, purchase the contract for and on behalf of the conspirators [Finding XII; R. 66]; and that, in furtherance of said conspiracy, John Harrah and Carleton Kinney fraudulently and wilfully refused to accept an offer made by Cruickshank Company on or about June 6, 1944, to sell the sprinkling contract for ten thousand dollars (\$10,000.00) [Finding XIV; R. 67], and thereafter, in furtherance of the conspiracy, Brown obtained an assignment in his name. [Finding XV; R. 67.]

The Referee further found that, in furtherance of the conspiracy, Brown was paid \$30,000.00 [Finding XXII; R. 70], and that during all of the above mentioned transactions John Harrah and E. A. Gerety held fiduciary positions with the Abbot Kinney Company and were not free to act contrary or antagonistic to the best interests of the Abbot Kinney Company. [Finding XXIII; R. 71.]

The Referee further found that the Company was financially able to buy the said sales contract for \$10,000.00 on June 6, 1944; that the contract was offered to said Company on June 6, 1944, for \$10,000.00 but that it was prevented from buying the contract by John Harrah with the help, assistance and connivance of William Harrah, E. A. Gerety, and Charles Brown [Finding XXIV; R. 71]; and the Referee further found that the reason for taking the contract in the name of Charles Brown was to mislead the Abbot Kinney Company as to the interest in the contract held by John Harrah, William Harrah, and E. A. Gerety [Finding XXV; R. 71], and that all acts in connection with the acquisition of and payment on said contract were in violation of the fiduciary obligations duly owing by Gerety and John Harrah to said Company and were done

for the purpose of defrauding and cheating that Company. [Finding XXVI; R. 72.]

The Referee further found that neither Gerety, Brown, John Harrah, nor William Harrah had any right to collect any moneys on said contract. [Finding XXXI; R. 73.]

From the foregoing findings, the Referee made, among others, the following conclusions of law: That neither E. A. Gerety, Charles Brown, John Harrah, nor William Harrah had any right to collect any money on said contract or to enforce any obligations thereunder as against the Abbot Kinney Company. [Conclusion IV; R. 75.]

Further, from the testimony of petitioner's own witness, Hugh Darling, an attorney representing the Cruickshank Company, there was no offer ever made to the Abbot Kinney Company on or about June 6, 1944, to sell the sprinkler contract to that Company or to sell the contract for \$10,000.00 or any other sum. [R. 399.] Darling testified that from about 1937 to 1944 he brought up the matter of the Abbot Kinney Company making payments on the sprinkler contract. [R. 386.] The contract was never offered to the Abbot Kinney Company by Cruickshank Company. [R. 402.] At various times negotiations were had with the Davis group for the Cruickshank people to join with them and operate the Kinney Company [R. 396] and at other times, the Davis group attempted to buy the sprinkler contract. In January of 1943 the Davis group was offered the sprinkler contract for \$10,000.00. This same contract had been offered to Williams and others at prices ranging from \$25,000.00 to \$50,000.00. [R. 392.] In 1944 Phillips, a concessionaire had negotiated for the purchase of the contract. [R. 392.] Halper had offered \$12,500.00 for the

contract. Davis had had some negotiations for the purchase of the contract but no price had been agreed upon by Darling, who had authority to negotiate the sale from Cruickshank Company. [R. 392.] The only testimony relative to \$10,000.00 purchase price was the testimony of the offer in 1943 which was an offer *to the Davis group and which was not presented to the Abbot Kinney Company until the day the offer was to expire*. Evidently the Davis group finding out that the corporation had no money to purchase the contract, had Newton take the matter up with the executive committee. It is to be noted that in 1943 the company did not have \$10,000.00 with which to buy the contract. The only other mention of a \$10,000.00 figure in connection with the sprinkler contract was in June, 1944, when Gerety and Brown first offered \$10,000.00, then \$12,500.00 and then \$15,000.00 for the contract. [R. 399.] Nothing in the record supports the finding that in any month in 1944, let alone on or about June 6, 1944, the Abbot Kinney Company or anyone else had been offered the sprinkler contract for \$10,000.00. In fact, the only price for the contract in 1944 was a price of \$15,000.00, which was finally paid by appellants. [R. 399.]

As will be more fully discussed hereafter, there has been no showing that E. A. Gerety violated any fiduciary obligation duly owing to the company.

In discussing the alleged violation of any fiduciary relationship by Brown, Gerety, William and John Harrah, it might be well to determine generally what powers the officers, agents, or employees of a corporation might have in regard to corporate affairs that could in any manner touch upon the matter here involved, namely, the purchase of the Cruickshank contract.

The law generally holds that officers of a corporation, including the president, secretary, and treasurer, have no rights, merely by virtue of the office they hold, to execute contracts on behalf of a corporation. (See *Jacob v. Gratiot Central Market Co.*, 257 Mich. 262, 255 N. W. 331. See, also, Annotations, 5 A. L. R. 1485, 107 A. L. R. 996; *Laird v. Michigan Lubricator Co.*, 153 Mich. 52, 116 N. W. 534; *Chemical National Bank v. Wagner*, 93 Ky. 525, 20 S. W. 535.)

The officers of a corporation are not generally regarded as having the power, by virtue of their office merely, to purchase real or personal property on behalf of the corporation, or to make a contract for its purchase. (*Blen v. Bear River & A. Water & Mining Co.*, 20 Cal. 602.)

The officers or agents of a corporation have no inherent power to borrow money on behalf of the corporation. (*Sentney v. Central Cattle Loan Co.*, 119 Kans. 545, 240 Pac. 586.)

The officers or agents of a corporation have only such power to release, settle, or compromise claims owing to the corporation as is conferred upon them expressly or impliedly. (*Potts v. Wallace*, 146 U. S. 689, 36 L. Ed. 1135.)

As to the particular powers of the four alleged co-conspirators, we find the following:

(a) As to E. A. GERETY (hereinafter referred to as "Gerety"):

Gerety, from 1937 to December 13, 1944, was the nominal general manager of the Abbot Kinney Company. [R. 435.] He had the power to employ help but not to employ heads of departments without authorization of the board

of directors. [R. 434.] He did not have the authority to discharge workmen without the authority or approval of the executive committee [R. 434], and could make ordinary, every-day purchases of supplies. [R. 577.] He had no power to enter into leases for and on behalf of the corporation, but did have the power to negotiate for leases with prospective tenants and then submit proposed leases to the board of directors or the executive committee. [R. 577.] He had no power to enter into any contracts for and on behalf of the corporation, to compromise debts, claims or litigation, to employ legal counsel, or to hypothecate, pledge, sell, or purchase property for the corporation. [R. 576 and 577.] In fact, from the testimony produced at the trial, Gerety had only limited powers and duties with respect to the corporation, falling far short of the powers of a general manager, and he had no general or discretionary powers or duties with respect to the corporation other than as to daily routine matters.

(b) AS TO JOHN HARRAH: John Harrah was on the board of directors and a member of the executive committee. He did bear a fiduciary relationship to the Abbot Kinney Company.

(c) AS TO CHARLES BROWN (hereinafter referred to as "Brown"):

Brown was a former employee of the company who had been discharged in April, 1944. His only power and duty at the time of employment was to collect money from various tenants of the pier. [R. 219.] He was not an employee at the time of the purchase of the alleged contract, but, irrespective of whether or not he was an employee at that time, there is no evidence of any fiduciary rela-

tionship between him and to the company, except possibly to account to the company for moneys he collected from tenants during the time he was an employee.

(d) AS TO WILLIAM HARRAH: William Harrah was a bondholder of the corporation and a tenant of the corporation. He held no position in the corporation, and of course owed no duty to the same.

The evidence has produced the following facts with regard to the purchase of the sprinkler contract by Brown and Gerety;

In June, 1944, Gerety, still the manager of the corporation, discussed the purchase of the contract with Brown (who was not then an employee of the corporation) and agreed that they should purchase the same. The contract was purchased by these two individuals for \$15,000.00, for themselves and no one else. [R. 244 to 249.]

Disputed evidence as to Al Newton's desire to buy a portion of Gerety's interest in the contract was admitted, but, irrespective of Newton's motives, his efforts to buy a portion of the contract would have no bearing on the right of the corporation to set aside the purchase by Gerety and Brown if in the purchase of said contract neither Gerety nor Brown violated any fiduciary relationship to the Abbot-Kinney Company.

As soon as the contract was purchased the corporate officers knew that Brown and Gerety owned the contract, and Brown and Gerety immediately made demands for payments on it. [R. 260 to 266.] The first demand was made on June 20, 1944, and as a result thereof \$7,500.00 was paid to Brown and Gerety on the contract, with the understanding that no action would be taken by them to

sue on the contract or to enforce any of their rights for a period of ninety days. [R. 260 to 266.] Thereafter and on November 8, 1944, the sum of \$30,000.00 was paid on the contract, and Brown and Gerety agreed that the corporation would be credited with \$50,000.00 on the Cruickshank contract. [R. 274.]

There is nothing in the evidence indicating that any negotiations for the purchase by John Harrah or William Harrah, on their own behalf or on behalf of either of them, of an interest in the sprinkler contract were entered into prior to November 9, 1944. On the contrary, the evidence clearly shows that it was not until November 25, 1944, that such negotiations were entered into. [R. 279 to 286.]

On November 25, 1944, William Harrah purchased one-half of Brown's interest in the contract, thereby becoming the holder of a one-third interest in the contract. [R. 376.] John Harrah, according to the testimony—and the only testimony produced at the trial—stated that when Brown told him that he was purchasing the contract he (John Harrah) stated that in his opinion the contract could be wiped out by the bondholders, and that his advice to Brown was not to purchase the contract. [R. 323 to 325.]

The testimony shows that Halper and Williams, directors of the corporation, were opposed to the company's buying the contract. [R. 520.]

From 1937 to and including the date of the purchase of the Cruickshank contract by Brown and Gerety, no effort was made by Brown or Gerety in any manner to prevent the directors, or anyone else on behalf of the corporation, from purchasing the contract. No evidence was ever

produced that either Brown or Gerety ever suggested to any of the directors that the corporation should not purchase the contract. The evidence clearly shows that Brown and Gerety made no attempt whatsoever to negotiate for the contract until after the lapse of a period of many years in which directors and members of the executive committee of the corporation had from time to time given consideration to and negotiated for the purchase of the Cruickshank contract, and in which the corporation had failed, after those negotiations and after such consideration, to consummate the purchase of the contract. The fact is that the evidence shows that the corporation had, for at least a second time (according to Newton's testimony after many times), definitely terminated all negotiations to purchase the contract prior to the purchase by Brown and Gerety. There is nothing in the evidence to show that Gerety or Brown took any advantage of the corporation by purchasing this contract at a time when the corporation was not financially able to do so; in fact, the testimony shows that the corporation had funds in excess of \$10,000.00 which could have been used for the purchase of the contract in June, 1944. [R. 344.] There is in the record no testimony of petitioner's witness, Hugh Darling, that any of the negotiations carried on between Brown, Gerety, and Darling in any manner interfered with or prevented the corporation from acquiring the contract.

The duties of Gerety, as heretofore set forth, show that he had no power to purchase the contract for the corporation or to negotiate for the purchase of the same by the corporation, or that he had any information or knowledge concerning the contract that in any manner was not communicated to the officers of the corporation.

From the facts set forth above, it must be concluded that there was no fiduciary relationship between Gerety or Brown and the corporation with respect to the Cruickshank contract. In support of this contention are the following citations, which, it may be noted, all involve the question of the fiduciary relationship between *officers* of a corporation and the corporation. Gerety, in his position as manager and with his duties as heretofore set forth, was *not an officer* of the corporation, and the cases hereinafter cited, which all involve the relationship of an *officer* to the corporation, clearly show that under no possible circumstances could any of the acts of Gerety be considered to be a violation of any fiduciary relationship.

Section 866, article on "Corporations," 13 Am. Jur. 854:

"The relationship of a person to a corporation, whether as officer or as agent or employee, is not determined by the nature of the services performed, but by the incidents of the relationship as they actually exist. In different connections in which the question has arisen, it has been held that a mere agent of a private corporation is not an officer thereof within the meaning of statutes or regulations requiring certain acts to be done by an officer.

"One distinction between officers and agents or employees of a corporation lies in the manner of their creation. An office is created usually by the charter or bylaws of the corporation, while an agency or employment is created usually by the officers. A further distinction may thus be drawn between an officer and an employee of a private corporation in that the latter is subordinate to the officers and under their control and direction.

“In reference to particular positions in the corporation, a field manager is not an officer of the company as he has no term of office, but is merely an employee. On the other hand, the secretary of a corporation has been held to be an officer and not a mere employee. To a like effect, a director or officer of a corporation is not, by virtue of his office, its employee. Rather, a director is a part of an elected body of officers constituting the executive representatives of the corporation. However, a director’s occupancy of such office does not disqualify him from becoming its employee where the duties and incidents of his employment are separate and distinct from those pertaining to his office. Thus, a general sales manager, although he is a director and vice president of the corporation, is an employee within a statute exempting the wages of an employee from attachment.”

E. Clemens Horst Co. v. Ind. Acc. Comm., 184 Cal., holds that an officer of a corporation is one whose office is provided for by the articles or the bylaws.

See article on “Corporations”, Vol. 19, *Corpus Juris Secundum*, Sec. 800, at page 185, wherein it is said:

“A director or officer has a right to purchase the outstanding obligations of the corporation and enforce payment of the same, unless the circumstances surrounding the transaction render it inequitable for him to do so; *and where the corporation is a going concern he may purchase at a discount and recover the full value of the claim* UNLESS THERE IS A PRESENT DUTY TO ACT FOR THE CORPORATION BY PURCHASING OR EXTINGUISHING THE CLAIM, *and the rights of other creditors are not involved*. Where, however, the corporation is insolvent he is precluded from recovering more than he paid for the claim, unless by an or-

der of the court or otherwise he has shown of all power in the corporate management and his trust relationship has been wholly terminated.” (Italics added.)

See, also, *Todd v. Temple Hospital Assn. Inc.*, 96 Cal. App. 43, which case involved several claims which were assigned to the plaintiff for collection against defendant under an agreement whereby the plaintiff was to receive twenty-five per cent of the amounts collected. At the time this action was commenced, plaintiff was a *director and assistant secretary* of defendant. The claims were orally assigned to him before his official connection with defendant commenced, and formal assignments thereof were made thereafter and before the action was filed.

The trial court held that plaintiff, by reason of the fact that he was an *officer* and the assignments were for collection only, was without capacity to sue the corporation. In reversing the judgment, the District Court of Appeal said:

“In the absence of fraud or inequitable circumstances the rule that it is a violation of his trust for an officer to deal with a corporation applies only where his conduct is in the nature of an attempt to unite his personal and representative characters in the same transaction *and where his official connection is an essential part of the corporate action.* * * * Within the above rule he is not compelled by the fact alone that he is a director to forego *any* of his rights as a creditor; and in bringing an adversary action against the corporation he is not in any way taking advantage of his position as a director, the right sought to be asserted being entirely independent of his fiduciary status * * *

Monroe v. Scofield, 135 F. (2d) 725 (1943), Circuit Court of Appeals, Tenth District:

Monroe, a *director* of Gallic-Vulcan Company, a bankrupt corporation, purchased from a judgment creditor of the corporation the \$732.60 judgment for \$200.00. His claim was allowed by the District Court for \$200.00 and he appealed. In holding that Monroe was entitled to a preferred claim for \$200.00, the Circuit Court said:

“Where a corporation is a going concern, a *director may purchase a claim against the corporation at a discount and enforce it for the full amount, absent a present duty on his part to act for the corporation.*” (Italics ours.)

Possibly the leading case is *Glenwood Mfg. Co. v. Syme* (Wisc.), 85 N. W. 432. Syme was the *President and a director* of the Glenwood Manufacturing Co. In November, 1896, the company was embarrassed for want of ready money and unable to pay its debts as they matured. At that time the company was indebted to one H. L. Humphrey on two notes of \$9,000.00 each, and Syme was one of the guarantors on the notes. There were certain other obligations of the company. Humphrey had a stock interest in the corporation, and, including the notes, his interest was worth at least \$45,000.00. He sold the notes, stocks, and other obligations against the corporation to Syme, without the knowledge or consent of the plaintiff's stockholders. Syme knew that it would be greatly for the interest of the corporation to make the purchase, and he caused the same to be made in the name of W. P. Hewitt, who held the same for approximately a year and then turned over the stocks and obligations to Syme. Syme also purchased a note of plaintiff's for \$18,000.00 in

February, 1897, without the knowledge or consent of any of the stockholders. In October, 1897, Syme presented the notes that he had purchased to the plaintiff and demanded and received a note of \$29,531.18. Syme later died and during the course of the administration of his estate, payments were made on the note, and later the plaintiff brought an action for an accounting. The court, in holding that the present action would not lie, among other things said:

“The remaining question involves the right of an officer and director of a corporation to purchase outstanding liabilities of the corporation at a discount and enforce them in full. * * * The rule has been broadly stated by some of the authorities that ‘a trustee, executor, or assignee cannot buy up a debt or incumbrance to which the trust estate is liable, for less than is actually due thereon, and make a profit to himself.’ Perry, Trusts, § 428. That is the doctrine sought to be invoked in this case, as applicable to a director regarded as a trustee by the corporation. But the statement, however correct in its application to specific instances, must be taken with the limitations which belong to it. The foundation of the rule is that a fiduciary agent, owing a duty to his principal, cannot make a contract for his own benefit which is inconsistent with that duty. It is where there is a collision between trust duty and personal interest that the equitable prohibition applies. The cases usually cited to support the doctrine are where a trustee buys in the property of his principal at a sacrifice for his benefit, when, if he bought it at all, it was his duty to do it for his principal, or he makes a contract in behalf of his principal with himself, directly or indirectly, as the other party to the agreement, or where by some secret arrangement he makes a profit directly

at the expense of his principal. (Citing cases.) As before stated, the entire basis of the rule consists in the collision between trust duty and personal interest. Can it be said that any such conflict exists in the ordinary case of the purchase by a director in a going corporation of its outstanding obligations? This is the test to be applied to the facts stated in the complaint.

* * * There was no present duty resting upon Syme to extinguish the notes, so far as appears from the complaint. It is not charged that he neglected any duty he owed to the corporation in not securing funds for their discharge, or that he diverted any of its moneys properly applicable thereto to other purposes. The plaintiff's case rests upon the bald proposition that, being an officer, he could not purchase said notes at a discount. We are not prepared to accept this statement in its entirety. It is only in cases where the conflict of duty mentioned arises that the rule is received in its fullest application. Thus, in *Mor. Priv. Corp.* § 521, it is said: 'So, an agent of a corporation may purchase claims against the company at a discount, and enforce them in full, if he is not under obligation to make the purchase on behalf of the corporation.' The supreme court of Kansas approved this statement as the law in a case where the treasurer of a railroad company purchased its promissory notes at a discount, and he was allowed to enforce them at their full face value. *Railroad Co. v. Chenault*, 36 Kan. 51, 12 Pac. 303. In *Inglehart v. Hotel Co.*, 32 Hun, 377, the law is stated thus: 'So, also, a trustee or director may with his own money purchase for himself, of a third person, a valid and subsisting outstanding debt owing by the company, and secure a perfect title thereto. Such a transaction is not even the ground for entertaining the suspicion that it is in violation of any duty which he owes the corporation,

and there is no presumption of law against its fairness. * * * The other question to be considered in this connection is, will the trustee or director be permitted to enforce a collection of the debt thus acquired for its entire amount, or shall he be limited to the sum which he actually paid for the debt or obligation? I am unable to discover any good reason why he should not be permitted to enforce payment for the full amount, nor can I find any decision limiting the trustee to the sum actually paid.' "

The evidence shows that Brown and Gerety, in June, 1944, commenced negotiations for the purchase of the sprinkler contract from the Cruickshank Company. This was approximately a year and a half after the Abbot Kinney Company had refused to buy the contract for the sum of \$10,000.00. The contract was for sale; all the directors of the Abbot Kinney Company knew that the contract could be purchased; negotiations had been carried on by the Cruickshank Company with Moses Davis and he had an option to purchase the contract in January, 1943. This option expired. Williams and Halper had also carried on negotiations for the purchase of the contract for themselves. There was no evidence that Gerety or Brown directly or indirectly prevented the company from purchasing the contract. The evidence further shows that John Harrah opposed the purchase of the contract from 1938 down to June, 1944. His position was consistent in connection with the contract, and it was known at all times that he opposed the purchase of the same. The position of Carleton Kinney for over a year was also known and Kinney, as a member of the executive committee, opposed the purchase of the contract. In the event the company

desired to purchase the contract, the board of directors could have held a meeting and four of the other directors of the company could have agreed to purchase the contract at any time from 1938 to June, 1944.

In connection with any so-called conspiracy, the law seems to be well settled that a civil conspiracy can exist either to do an unlawful act or to do a lawful act by unlawful means. (See *Parkinson v. Building Trade Council*, 154 Cal. 581; *Frost v. Hanscome*, 198 Cal. 550.)

The law is well settled that the mere fact that there is a conspiracy gives no right of action unless something is done which, without the conspiracy, would itself be actionable. (*Bowman v. Wohlke*, 166 Cal. 121.)

In the instant case there are findings to the effect that the alleged co-conspirators conspired to buy the Cruickshank contract. There has been no evidence produced that there was any concert of action or any conspiracy formed up to and some time after the purchase of the contract, if at all.

A review of the evidence relative to any so-called conspiracy to purchase the sprinkler contract fails to show that either William Harrah or John Harrah was interested in, participated in, or in any manner procured, aided or assisted in, the purchase of the contract. In June, 1944, Brown and Gerety met and negotiated for the purchase of the sprinkler contract. The only evidence relative to either William or John Harrah in connection with this purchase by Brown and Gerety is the one statement that John Harrah told Brown that he thought the holder of the contract might receive nothing on the same if the bonds were foreclosed.

Assume, for the sake of argument and for this purpose alone, that there was a conspiracy between Gerety and Brown to purchase the contract, we find that there is nothing actionable in connection with such a conspiracy, for the following reasons:

It was not unlawful for either Gerety, Brown or both to purchase the contract. It appears from the discussion heretofore had of the relationship of Gerety and Brown to the corporation, and of the particular facts surrounding the Cruickshank contract, that there was no fiduciary relationship between Brown or Gerety and the corporation in connection with this contract. From the cases heretofore cited, any person could become a creditor of the corporation who was not in a fiduciary relationship with the corporation, and even officers and directors who were in fiduciary relationship with the corporation could, under the law as heretofore quoted, purchase obligations of the corporation.

Analyzing the purchase, we find that it was lawful and that no unlawful means were used in effecting the purchase. It was generally known that the contract was for sale; the corporation did not buy the contract; and after a year and a half of various negotiations between the corporation and others on the one hand and the Cruickshank Company on the other, Gerety and Brown, who bore no fiduciary relationship to the corporation, purchased the contract; Darling, the attorney for the Cruickshank Company, informed Davis and other directors that negotiations

were pending with persons other than the corporation for the purchase of the contract.

Inasmuch as the purchase of the contract of itself was not unlawful, and the means of acquiring the same were not unlawful, no action could be brought by the corporation based on a conspiracy in connection with the purchase of the contract. (See cases of *Bowman v. Wohlke, supra*; *Parkinson v. Building Trade Council, supra*, and *Frost v. Hanscome, supra*.)

No question can arise as to the motive of Gerety and Brown in purchasing the contract inasmuch as, if their motive was evil, the mere fact that they purchased the contract, which of itself was not unlawful, would not, under the law, be made unlawful by the fact that they were guided by an evil motive. (See *Union Labor Hosp. v. Vance Lumber Co.*, 158 Cal. 551.)

The contract was purchased by Brown and Gerety. After purchasing the same, they of course had the right to demand payment of the contract in full. They did obtain part payment on the contract. One payment made to Gerety and Brown was at a discount of \$20,000.00. There has been no evidence produced that Brown, Gerety, or either of the Harrahs, up to the time of the final payment on November 18, 1944, ever met or did any acts in concert for the purpose of enforcing payment. Neither of the Harrahs had any interest in the contract up to that period of time. Demand was made by Brown and Gerety that the corporation make payments on a legal contract, namely,

the Cruickshank contract. They certainly had the right to demand that these payments be made. At the time the payments were made the company had had a very successful year and had moneys with which to make payments on the contract. The mere fact of payment upon the contract would not of itself show any conspiracy, and this is true even though all the parties had—and there is no evidence of this—met to have the company make payments on the contract. Demand was made that the company, which was then capable of doing so, make some payments on a valid outstanding obligation. No other creditors of the company were injured by reason of this demand or payment. \$7,500.00 was paid on the contract. At a later date \$30,000.00 was paid on the contract, and the company was given credit for \$50,000.00. The right of Gerety and Brown to acquire the contract cannot be assailed, and their right to demand money on the contract cannot be assailed as having anything to do with an actionable conspiracy. The obligation being legal and being enforceable for its face amount, what is there illegal about requiring the company to pay its obligation at its face value for the full amount? If it is not illegal there is no basis for an action for conspiracy. (See cases *supra*, where it is held that an action based on a conspiracy must be predicated upon the doing of an unlawful act or the doing of a lawful act by unlawful means.)

Conclusion.

It is respectfully urged by appellants that the order appealed from be annulled and set aside.

As in this brief above shown, the lower court and the referee in bankruptcy acted :

(a) Without having the jurisdiction of the bankruptcy court ever invoked :

(1) By parties entitled to file an involuntary petition.

(2) By an original and amended involuntary petition which stated an act of bankruptcy.

(b) Where the matter tried was not the subject matter of a summary proceeding, and the debtor could not institute the same.

(c) Where the dismissal of the involuntary petition deprived the lower court of jurisdiction to proceed with further orders.

We think the record shows abuse of discretion and error where the parties stipulate to a proper procedure under the Bankruptcy Act and the court approves the stipulation and the appellants deposit the \$30,000.00 in accordance with the stipulation, and thereafter the referee permits a repudiation of the stipulation and proceeded contrary to the provisions of the Bankruptcy Act, to determine title to said \$30,000.00 in a summary proceeding. This constitutes a practice that should not be sanctioned by this court.

We think further error is apparent in that the referee denied the right of appellant Harold Pool as a creditor to intervene and declined to grant his motion to dismiss, where the alleged bankrupt and the attorney for the petitioning creditors were attempting by collusion and agreement to impose upon the jurisdiction of the District Court.

We further submit that the evidence offered does not support the findings of a conspiracy, and that if any conspiracy existed it was over a year after the company could have acquired the conditional sales contract for the sum of \$10,000.00, and that the District Judge, on his own motion, without any review having been taken by the Abbot Kinney Company, held the conditional sales contract to be acquired in trust at a price of \$15,000.00, but that the trustees were only entitled to be paid \$10,000.00 by the said corporation.

We respectfully submit that the order appealed from of May 27, 1946, be reversed and set aside.

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APPENDIX.

Section 24, Sub. a of the Bankruptcy Act:

The Circuit Courts of Appeal of the United States and the United States Court of Appeal for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: Provided, however, That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: Provided further, That when any order, decree, or judgment involves less than \$500, an appeal therefrom may be taken only upon allowance of the appellate court.

Section 23, Subdivs. a and b of the Bankruptcy Act:

JURISDICTION OF THE UNITED STATES AND STATE COURTS. a. The United States District Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67 and 70 of this Act.

Section 60, Sub. a of the Bankruptcy Act:

PREFERRED CREDITORS. a. A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy, or of the original petition under chapters X, XI, XII, or XIII of this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy or of the original petition under chapters X, XI, XII, or XIII of this Act, it shall be deemed to have been made immediately before bankruptcy.

Section 335 of the Code of Civil Procedure:

INTRODUCTION. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

Section 336a, Subs. 1 and 2, Code of Civil Procedure:

SIX YEARS—Corporation Bonds, Notes or Debentures. Within six years. 1. An action upon any bonds, notes or debentures issued by any corporation or pursuant to permit of the Commissioner of Corporations, or upon any coupons issued with such bonds, notes or debentures, if such bonds, notes or debentures shall have been issued to or held by the public.

2. An action upon any mortgage, trust deed or other agreement pursuant to which such bonds, notes or debentures were issued. Nothing in this section shall apply to bonds or other evidences of indebtedness of a public district or corporation.

No. 11397.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

In the Matter of
ABBOTT KINNEY COMPANY,
Alleged Bankrupt.

E. A. GERETY, WILLIAM HARRAH, CHARLES BROWN and
HAROLD POOL,

Appellants,

vs.

ABBOTT KINNEY COMPANY,

Appellee.

APPELLEE'S BRIEF.

FILED

DEC 20 1943

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Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

The United States District Court for the Southern District of California had jurisdiction over the parties and subject matter by reason of an amended involuntary petition in bankruptcy filed by three creditors against Abbot Kinney Company. (See Title 11, Chap. 2, Sec. 11, U. S. Code Ann., page 26, 1945 Cumulative Annual Pocket Part.)

This court has jurisdiction by reason of Sec. 24 (a) of the Bankruptcy Act, Title 11, Chap. 4, Sec. 47, U. S. Code Ann. (p. 360.)

Statement of Case and Questions Presented.

(a) Statement of Case.

Appellant's "Statement of Facts" in inadequate and in several instances untrue. For that reason Appellee cannot accept it.

The Abbot Kinney Company, a California corporation, on the 1st day of April, 1931, issued its Trust Indenture securing \$350,000 First Mortgage 7% Sinking Fund Gold Bonds, due April 1, 1944 [R. 9], under which Trust Indenture, the California Trust Company was made trustee with the right to act for all bondholders [R. 585] excepting where the individual bondholders right of action arises out of collusion, fraud, wilful negligence or gross misconduct. [R. 591.] No interest was paid on said bonds from and after 1932 [R. 305], although enough of the bonds were retired so that as of Oct. 21, 1944, only \$269,000 principal amount thereof were still outstanding. [R. 3, 6, 9, 142.]

\$196,000 principal amount of said bonds were accumulated by J. F. Williams, William Harrah and I. Edward Robbins in a pool during the period from 1932 to 1937 [R. 508, 509] and were owned by them on Dec. 23, 1937, at which time they were deposited with California Trust Company under an agreement dated the 23rd day of December, 1937, by and between said J. F. Williams, I. Edward Robbins and William Harrah as the bond group, and Moses C. Davis, W. Thomas Davis and Alfred A. Newton as the stockholders group [R. 122.] (which agreement shall hereinafter be referred to as the pooling agreement). Pursuant to the terms of said pooling agreement, John Harrah, agent and father of William Harrah, and Lou Halper, agent for I. Edward Robbins [R.

324] were elected to the Board of Directors of Abbot Kinney Company as the nominees of the bond group and have served continuously in such capacity since that time. [R. 299, 508.]

In 1940, an Executive Committee of Abbot Kinney Company consisting of John Harrah, Carleton Kinney and Al Newton was appointed by the Board of Directors and given authority to carry on the business of Abbot Kinney Company between meetings of the Board of Directors. [R. 300.] This committee served until December, 1944, when it was dissolved. [R. 468.]

On June 2nd, 1931, Abbot Kinney Company and F. R. Cruickshank & Company entered into a conditional sales contract (hereinafter referred to as the sprinkling system contract) [R. 82] pursuant to which F. R. Cruickshank & Co. installed a sprinkling system on some of the property of Abbot Kinney Company at Venice, California. The sprinkling system contract provided in part that F. R. Cruickshank & Co. would retain title to the sprinkling system until the entire purchase price had been paid. [R. 90.] Prior to and at the time of the filing of the involuntary petition in bankruptcy in this matter, and at all times thereafter, Abbot Kinney Company was and still is in possession of said sprinkling system. [R. 17, 205.]

On Dec. 29th, 1937, the sprinkling system contract had long been in default showing an unpaid balance of \$137.-181.30 plus some accrued interest. [R. 303, 388.] On that date, it was modified so as to provide for payment of the balance in yearly installments of \$30,000. [R. 98.] Nothing was paid thereon thereafter [R. 303] until the payments to the appellants herein, even though Hugh Darling, attorney for F. R. Cruickshank & Co., often re-

quested payment on account. [R. 304, 305, 318, 319, 510, 511.]

In January of 1943, Cruickshank & Co. offered to sell the sprinkling system contract for \$10,000. [R. 491.] John Harrah took the position at the meeting of the Executive Committee which considered the offer, that he was primarily interested in the bonds and since the sprinkling system contract was junior to the bonds, there was nothing much that F. R. Cruickshank & Co. could do and therefore, the company should not make the purchase. [R. 492, 493.] This was the same position which Harrah had always theretofore taken when the value of the sprinkling system contract had been considered at Directors Meetings. [R. 513.] Carleton Kinney agreed with John Harrah and together they rejected the offer of Cruickshank & Co. [R. 493, 494.] and refused to purchase the sprinkling system contract for \$10,000 even though Abbot Kinney Company was financially able to make the purchase. [R. 558, 559.]

It became apparent in the early part of 1944 to the other directors of Abbot Kinney Company that John Harrah and Carleton Kinney were operating the affairs of Abbot Kinney Company, through their control of the Executive Committee, for their own personal benefit and not for the best interests of Abbot Kinney Company. [R. 521.] A special meeting of the six remaining directors of Abbot Kinney Company (Hugh Darling having resigned) was called for May 3, 1944, for the purpose of dissolving the Executive Committee. Helen Kinney Ward, a nonresident director refused to come to California for the meeting. Also John Harrah and Carleton Kinney, knowing the purpose of the meeting, refused to attend so as to constitute a quorum. [R. 326, 469, 470.] There-

fore, it was impossible by means of a directors' meeting to dissolve the Executive Committee at that time. The Executive Committee therefore continued to carry on the affairs of the company [R. 470, 471] with John Harrah and Carleton Kinney continuing to act as a bloc. [R. 500.]

On June 6th, 1944, the offer to sell the sprinkling system contract for \$10,000 was again renewed by Cruickshank & Co. Al Newton told E. A. Gerety (hereinafter referred to as Gerety) the General Manager of Abbot Kinney Company, of the offer and urged Gerety to help persuade John Harrah to vote for the acceptance of the offer, which Gerety agreed to do. [R. 496, 497.] Several days later, Al Newton saw John Harrah and urged him to vote in favor of the purchase. John Harrah stated that F. R. Cruickshank & Co. had no remedy except to take out the pipe and that it wasn't worth the cost of labor—also that no one else would buy the contract and the company could therefore purchase it at any time. [R. 497, 498.] Without contacting any other members of the Board of Directors to find out whether the Abbot Kinney Company should buy it, John Harrah again rejected the offer of Cruickshank & Co. to sell the sprinkling system contract for \$10,000. [R. 325.]

During the time Al Newton was soliciting Gerety's aid to persuade John Harrah to accept the renewed offer of June 6th, 1944, of Cruickshank & Co. to sell the sprinkling system contract for \$10,000, Gerety and Charles Brown (hereinafter referred to as Brown) were negotiating with Hugh Darling for the purchase of the sprinkling system contract. [R. 254, 448.] John Harrah knew this at the time Al Newton urged him to purchase it on behalf of the Abbot Kinney Company, having been so told by Brown. [R. 321 to 325 incl.]

On June 13th, 1944, Brown and Gerety completed the purchase of the sprinkling system contract for \$15,000. [R. 256, 258.] The assignment was taken in the name of Brown alone [R. 260] although Gerety paid \$5,000 of the purchase price. [R. 258.] Brown's portion of the purchase price was paid by two cashier's checks, issued on the same bank at the same time and made payable to the same person. [R. 289, 290, 571, 572.] The money for the two checks was obtained in part from a safe deposit box and in part from a checking account. Brown had no explanation for obtaining two cashier's checks instead of one although questioned at length thereon by Referee Brink. [R. 289 to 292 incl.] Before making the purchase, Brown knew that nothing had been paid upon the sprinkling system contract since 1932. [R. 253.] This fact had been pointed out to him by Gerety. [R. 245.]

On June 20th, 1944, with Gerety's knowledge and consent [R. 453], Brown demanded of Abbot Kinney Company payment of \$7500 on account of the sprinkling system contract [R. 262] and threatened to turn the water off, as permitted in the sprinkling system contract, if it wasn't paid. [R. 266.] The figure of \$7500 was suggested to Brown by Gerety. [R. 264.] John Harrah and Carleton Kinney as members of the Executive Committee, authorized the payment of the \$7500 without an argument and without making any attempt to purchase the sprinkling system contract from Brown or compromise the balance of the obligation thereunder [R. 455] although they knew that only \$15,000 had been paid for it. [R. 267, 371.] Al Newton was not present at the Executive Committee meeting which authorized the payment of \$7500 and was not sure that such a meeting was ever held. [R. 499.] Gerety received \$2500 as his share of the \$7500 payment. [R. 456.]

Because of this payment of \$7500 to Brown by John Harrah and Carleton Kinney, an involuntary petition in bankruptcy was filed against the Abbot Kinney Company on October 21, 1944, in the U. S. District Court by three bondholders, one of whom was Frank Williams, the largest single bondholder [R. 2 to 4 incl.], which alleged among other things that the total amount due on the bonds for principal and interest exceeded \$500,000 and that the total reasonable value of all assets of Abbot Kinney Company did not equal \$400,000. [R. 3.]

The Executive Committee immediately employed Harold Pool (hereinafter referred to as Pool), attorney for John Harrah, William Harrah [R. 250, 251] and Brown, as one of its attorneys to defend against the involuntary petition. Pool had theretofore conferred with Brown and had advised him on the purchase of the sprinkling system contract [R. 245] and the procedure Brown should follow in order to collect the \$30,000 on account. [R. 269, 270, 272, 273.]

On November 8th, 1944, at 2 o'clock P.M., a special meeting of stockholders of Abbot Kinney Company was held and a new Board of Directors was elected. [R. 348.] Brown knew that there was to be a meeting. [R. 269.] John Harrah was informed several days in advance that the meeting was to be held. [R. 342.] John and William Harrah tried to prevent the meeting by having William Harrah forbid the voting trustees under the pooling agreement to vote a majority of the stock of Abbot Kinney Company at such meeting. [R. 348, 129.] This maneuver was defeated and the new Board was declared legally elected by a judgment of the Superior Court. [R. 465.]

On the morning of November 7th, 1944, John Harrah and Carleton Kinney purportedly held a meeting of the Executive Committee and after demand by Brown [R. 269, 270, 271] authorized the payment of an additional \$30,000 on account of the sprinkling system contract. [R. 310, 343 to 354 incl., 486.] Carleton Kinney relied upon John Harrah's statement that the amount should be paid and voted in favor of its payment. [R. 485.] John Harrah and Carleton Kinney paid the \$30,000 by check dated November 8, 1944, drawn in favor of Brown [R. 354] on the account of Abbot Kinney Company with Security First National Bank of Los Angeles. [R. 108.] Brown paid Gerety \$10,000 of the \$30,000. [R. 279.] Brown knew at the time he received the \$30,000 that a petition in bankruptcy was then pending against the Abbot Kinney Company [R. 278], as did John Harrah [R. 350] and Gerety. [R. 460.] John Harrah was so anxious to make the payment of \$30,000 to Brown that he didn't even ask the Abbot Kinney Company's attorney if he had the right to do it while the bankruptcy proceedings were pending. [R. 350.] Furthermore, John Harrah made the \$30,000 payment even though he knew a special meeting of stockholders was being held the next afternoon for the purpose of electing new directors [R. 348] and without contacting any of the other directors of Abbot Kinney Company to ascertain their desires in the matter. [R. 351.] This readiness on the part of John Harrah to pay substantial sums on account of the sprinkling system contract when demanded by Brown was a complete reversal of the position taken by John Harrah during the time that F. R. Cruickshank & Co. owned it and made its many demands for payment. [R. 318, 319, 492, 493, 510, 511.] John Harrah, prior to Brown's acquisition thereof, always contended that the sprinkling

system contract was valueless and should not be purchased since it was junior to the bonds and would be wiped out on their foreclosure. [R. 318, 319, 492-494, 497, 498, 512.]

John Harrah was treasurer of Abbot Kinney Company in November, 1944. [R. 345.] Because of an outstanding judgment against Abbot Kinney Company which was being appealed, John Harrah had adopted the practice of putting the Abbot Kinney Company's money in cashier's checks and then holding them so that if execution were levied on the Abbot Kinney Company's bank account, the Abbot Kinney Company would not be put out of business. [R. 344.]

According to John Harrah, Brown learned from Gerety that the Company had about \$40,000 on hand at the time the demand for the \$30,000 was made. [R. 346, 347.]

In order to meet the check for \$30,000 given to Brown, John Harrah deposited the cashier's checks in his possession to the account of Abbot Kinney Company. [R. 354, 355.]

Gerety was first employed as Manager of Abbot Kinney Company in 1926. [R. 433.] He served in that capacity until 1933, at which time Abbot Kinney Company went into receivership and Gerety was appointed Receiver. [R. 434.] He acted as Receiver until the fall of 1937, at which time Abbot Kinney Company filed a petition under 77 b of the Bankruptcy Act. Gerety was then appointed Trustee in that proceeding which was dismissed within four or five months. Gerety was again employed as Manager which position he continuously filled until November 30, 1944. [R. 435-36.] His salary as Manager was \$500 per month. [R. 436.]

Gerety had the duties of a general manager including the right to hire and fire, negotiate for the rental of property subject to approval or rejection of the Board of Directors or Executive Committee and to otherwise carry on the normal business of the Company. [R. 436-446, incl., 490.]

At the time the sprinkling system contract was purportedly purchased by Brown, Gerety knew the amount of money Abbot Kinney Company had on hand because its books were under his jurisdiction. [R. 450.] Soon after the sprinkling system contract was purchased, Gerety told Al Newton that Brown and "somebody else" had asked him (Gerety) to participate in the purchase. Gerety would not identify the "somebody else" as William Harrah. [R. 499.] John Harrah and Carleton Kinney knew that Gerety owned an interest in the sprinkling system contract on the date the demand for payment of \$7500 was made. The Executive Committee never asked Gerety what he would take to settle the sprinkling system contract in full. [R. 455.] At the time demand was made for the \$30,000, Gerety knew that a petition in bankruptcy had been filed against the Abbot Kinney Company. [R. 460-1.] According to Gerety, Abbot Kinney Company had approximately \$38,000 in its treasury at the time the \$30,000 was paid. [R. 461.] Not long after Gerety received his share of the \$30,000, his employment with Abbot Kinney Company terminated because the new Board of Directors had been elected. [R. 464-5.]

On April 13, 1937, John Harrah filed a personal voluntary petition in bankruptcy. He never obtained a discharge in those proceedings, however, because of an adverse report by the Referee, although he applied for it. [R. 297.] From that date on, John Harrah never car-

ried on a business in his own name except a limited law practice. [R. 297, 298.] He thereafter purportedly devoted his time to the interests of his son William Harrah. [R. 296, 297.] However, the relationship was very confusing and it was difficult to know whether he was acting for William Harrah or himself. [R. 518.]

John and William Harrah had absolute confidence in Brown. [R. 369.] He was their intimate personal friend [R. 212], and they trusted him to the fullest. [R. 370.]

From and after John Harrah's failure to receive a discharge in bankruptcy, William Harrah's, John Harrah's and Brown's business affairs interweave. [R. 294, 295, 327, 328, 215, 216, 218, 219, 233, 234, 517, 501-505, 523, 524.] Brown worked for William Harrah on different occasions thereafter. [R. 294, 295.] Once as bartender, [R. 327-8] then in a retail liquor store. [R. 215-16.] Also Brown bought merchandise for William Harrah's Reno business and ran errands for William Harrah when requested. [R. 218-19.] Brown commingled William Harrah's supplies with his own. [R. 217.] He had access jointly with John Harrah to William Harrah's safe in Venice. [R. 367.] Brown could take money out of the safe at any time and deal with it as he saw fit. [R. 233, 234, 517.] John Harrah used this same safe to keep Abbot Kinney Company's cashier's checks. [R. 369.] John Harrah would negotiate business deals for William Harrah and would then turn them over to Brown. [R. 501-505.] Also, John Harrah favored Brown with leases from Abbot Kinney Company. [R. 236, 237, 506-507.] After Brown purportedly purchased the sprinkling system contract and prior to the payment of the \$30,000

on account, John Harrah "controlled it" and offered to sell to Frank Williams and I. Edward Robbins the same percentage of interest therein as they each held in the bond pool. [R. 514, 515, 523, 524.] Brown always sought John Harrah's advice on how to conduct his business in the Robbins Building. [R. 240.] During the process of acquiring the sprinkling system contract, Brown talked to John Harrah about its value. [R. 249.] John Harrah explained to Brown how Brown could expect to be paid by Abbot Kinney Company and from what sources the money would come. [R. 252.] Merely because William Harrah indicated the desire, Brown purportedly sold to him for the sum of \$3000, a \$27,000 interest in the sprinkling system contract upon which Brown and Gerety had only recently received \$37,000. [R. 280-5, incl.]

Brown's assets were very limited. He arrived in Venice in 1936 with between five and eight thousand dollars. [R. 232.] None of his activities were particularly profitable thereafter until John Harrah gave him leases from Abbott Kinney Company in the latter part of 1943. [R. 221-232, incl.] He worked for Abbot Kinney Company for \$40.00 per month in 1943 [R. 220], and for William Harrah, in his liquor store, for \$40.00 per week. [R. 234.]

Brown knew that John Harrah had been a director of Abbott Kinney Company since 1940. He also knew that John Harrah had been a member of the Executive Committee since 1942 and served in that capacity until December, 1944. [R. 235.] Brown also knew that Gerety was the Manager of Abbot Kinney Company from at least 1940 to Gerety's discharge in November of 1944,

and that Gerety was in full charge of the activities of Abbot Kinney Company. [R. 241.]

According to Brown, Gerety called the sprinkling system contract to Brown's attention and also was the one who made the date with Hugh Darling to discuss its purchase. [R. 242.] Brown knew that the sprinkling system contract had been offered to the Abbot Kinney Company for \$10,000 before he purportedly purchased it. [R. 243.]

After the new Board of Directors of Abbot Kinney Company was elected on November 8, 1944, Harold Pool and associate were dismissed as attorneys for Abbot Kinney Company and Grainger & Hunt were employed in their place.

An Order directed to Brown to show cause why he should not repay the \$30,000 to Abbot Kinney Company, was obtained on the petition of the petitioning creditors in the above entitled matter. [R. 24.] Before the order to show cause came on for hearing and by stipulation approved by the court and entered into by and between the petitioning creditors, Brown, and Abbot Kinney Company, the \$30,000 was placed by Brown in custody of the Clerk of the District Court as a court of bankruptcy and the order to show cause was discharged without prejudice. [R. 24-28, incl.]

Thereafter, it became apparent to the Abbot Kinney Company and the petitioning creditors that the only real issue between them on the petition in involuntary bankruptcy was the solvency or insolvency of Abbot Kinney Company. Abbot Kinney Company was willing to concede that it was insolvent and should be declared a bankrupt if most of the \$30,000 belonged to Appellants herein

and Abbot Kinney Company owed a balance of \$80,000 on the sprinkling system contract. Also the petitioning creditors were willing to concede that Abbot Kinney Company was not insolvent and should not be declared a bankrupt if most of the \$30,000 belonged to Abbot Kinney Company and Abbot Kinney Company owned the sprinkling system free and clear of liability. [R. 155.]

Therefore, in order to obtain a judicial determination of the respective rights of the parties in and to the \$30,000 on deposit and the sprinkling system, which would be binding upon all parties involved and would be conclusive on the question of insolvency, Referee in Bankruptcy, Hugh L. Dickson, upon the petition of Abbot Kinney Company [R. 17-23, incl.], issued an order on the 7th day of July, 1945, which, among other things, required the appellants herein and John Harrah to show cause why an order should not be entered (1) adjudging Abbot Kinney Company to be the owner of the sprinkling system and (2) directing the Clerk of the court to pay to Abbot Kinney Company, the sum of \$30,000. [R. 29-30.] Petitioning creditors joined forces with Abbot Kinney Company on the hearing of the said order to show cause. [R. 29.]

At the commencement of the hearing of the said order to show cause, John Harrah orally disclaimed any interest in the sprinkling system and in the \$30,000. [R. 198.] The appellants herein filed written answers to the order to show cause and the petition upon which it was issued. [R. 31-41, incl.] Brown and Gerety filed written objections to the jurisdiction of the Bankruptcy Court to hear and determine the issues raised by the order to show cause and the petition upon which it was

issued. [R. 42-44, incl.] William Harrah orally adopted said objections to jurisdiction. [R. 202.]

The order to show cause and the objections to jurisdiction of the Bankruptcy Court, came on for hearing before Referee Dickson on July 23, 1945. The objections to jurisdiction were overruled by him. [R. 202, 203.] Thereupon it was suggested by one of the counsel in the case that Referee Dickson was disqualified by reason of prejudice to proceed with the matter. Referee Dickson stated that he was free of bias, but that since the question had been raised, he would request Referee Benno Brink to proceed with the matter. No objection being made, the matter was taken over by Referee Benno Brink and in due course appropriate orders of reference were made. [R. 12, 13.]

Referee Benno Brink began the hearing on the order to show cause, the petition upon which it was issued and the answers thereto, on July 24, 1945. At the commencement of the hearing, appellants herein renewed their aforesaid objections to the jurisdiction of the Bankruptcy Court. Referee Brink concurred in Referee Dickson's ruling and again overruled the objections. [R. 202, 203.]

At the completion of the hearing and after excoriating appellants herein and John Harrah for the unconscionable conspiracy and confederation to defraud and cheat Abbot Kinney Company in which they had participated [R. 605-610, incl.], Referee Brink announced his decision from the bench, holding (1) that Brown and anyone associated with him could not collect a greater sum from Abbot Kinney Company on the sprinkling system contract than they had paid for it, to wit: \$15,000.00; (2) that, since Brown had received \$7500 on account in June

of 1944, the \$30,000 payment, which was made after the filing of the involuntary petition in bankruptcy, was valid only to the extent of \$7500 and invalid as to the remaining \$22,500; (3) that, accordingly, the Clerk of the Court should deliver to Brown \$7500 and to Abbot Kinney Company \$22,500 of the \$30,000 deposited with him. [R. 610, 611.]

On August 23, 1945, Referee Benno Brink signed and filed his written Findings of Fact, Conclusions of Law and Order in the matter [R. 61-79, incl.], which, among other things, found and held the following: (1) that prior to and at the time of the filing of the involuntary petition in bankruptcy and continuously since then, Abbot Kinney Company was in possession of the sprinkling system [Finding VIII, R. 65]; (2) that sometime prior to the 13th of June, 1944, at the instance and instigation of John Harrah, an unconscionable conspiracy was knowingly, wilfully and fraudulently entered into between John Harrah, William Harrah, Brown and Gerety, to defraud and cheat Abbot Kinney Company by having the Executive Committee refuse to purchase the sprinkling system contract, and to have Brown, as undisclosed agent of the conspirators, purchase the sprinkling system contract at as low a figure as he could negotiate and to thereafter have the Executive Committee, through the influence of John Harrah, authorize and order the payment to Brown, of said sprinkling system contract as rapidly as money was available [Finding XII, R. 66]; (3) that in furtherance of said conspiracy, John Harrah and Carleton Kinney fraudulently and wilfully refused to accept an offer made by Cruickshank & Company on or about June 6, 1944, to sell the sprinkling system contract for \$10,000 [Finding XIV, R. 67]; (4) that thereafter in

furtherance of the conspiracy, Brown obtained an assignment of said sprinkling system contract in his own name [Finding XV, R. 67]; (5) that in furtherance of the conspiracy, Brown was paid \$7500 on June 20, 1944, and \$30,000 on November 7, 1944, on account of said sprinkling system contract [Findings XVIII and XX, R. 68, 69, 70]; (6) that during all of the above mentioned transactions, John Harrah and Gerety held fiduciary positions with the Abbot Kinney Company and were not free to act contrary or antagonistic to the best interests of Abbot Kinney Company [Finding XXIII, R. 71]; (7) that Abbot Kinney Company was financially able to buy the sprinkling system contract for \$10,000 on June 6, 1944, and would have done so if it had not been prevented by the conspiracy instigated, conceived and executed by John Harrah with the help, assistance and connivance of William Harrah, Gerety and Brown [Finding XXIV, R. 71]; (8) that the written assignment of the sprinkling system contract was taken in the name of Brown for the purpose of misleading Abbot Kinney Company and its directors and officers, other than John Harrah, of the interest therein held by John Harrah, William Harrah and Gerety [Finding XXV, R. 71]; (9) that all acts in connection with the acquisition of and payment on account of the sprinkling system contract were in violation of the fiduciary obligations and duties owed by Gerety and John Harrah to Abbot Kinney Company, of which Brown and William Harrah well knew and were done for the purpose of defrauding and cheating Abbot Kinney Company [Finding XXVI, R. 72]; (10) that on the 30th day of November, 1944, William Harrah advised Abbot Kinney Company in writing that he had purchased a one-third interest in the unpaid balance due on the sprinkling system

contract on the 26th day of November, 1944, which notice was sent to Abbot Kinney Company in furtherance of the conspiracy and for the purpose of misleading Abbot Kinney Company as to the date on which said William Harrah obtained his interest in the sprinkling system contract [Finding XXVIII, R. 72]; (11) that Abbot Kinney Company owns the sprinkling system free and clear of the sprinkling system contract; and (12) that Abbot Kinney Company is entitled to receive \$22,500 of the \$30,000 on deposit with the Clerk of the court, as a court of bankruptcy, and Brown and Gerety are entitled to receive the remaining \$7500. [Finding XXXII, R. 74.]

The appellants herein then petitioned for review of said order of August 23, 1945, of Referee Benno Brink. [R. 45.] Thereafter and on the 27th day of May, 1946, the Hon. J. F. T. O'Connor, Judge of the District Court, filed his Memorandum Order [R. 178] in which he approved, adopted and accepted the Findings of Fact, Conclusions of Law and Order of the Referee, excepting only those which provided that Brown should receive \$7500 of the \$30,000 on deposit, as to which he reversed. In lieu thereof, Judge O'Connor ordered that only \$2500 be delivered to Brown. Judge O'Connor adopted the position (which was the same as that urged by Appellee herein at the trial of the matter before Referee Benno Brink [R. 595]) that the most Brown could receive from Abbot Kinney Company on the sprinkling system contract was \$10,000 since it was through his conspiracy with John Harrah and the other appellants herein that Abbot Kinney Company was fraudulently deprived and cheated of purchasing the sprinkling system contract for \$10,000. [R. 183, 184.]

Thereafter, and on the 17th day of June, 1946, Judge O'Connor signed and filed his formal written order on

review from the order of the Referee which provided in part that (1) Abbot Kinney Company owned the sprinkling system free and clear of the sprinkling system contract; (2) that the Clerk of the court, as a court of bankruptcy, should forthwith turn over and deliver to Abbot Kinney Company, \$27,500 of the \$30,000 on deposit, and to Brown the remaining \$2500. [R. 190, 191, 192.]

It is from this order that the appellants herein take this appeal. [R. 193.]

(b) Questions Presented.

1. Did the United States District Court, sitting as a court of bankruptcy, have jurisdiction to hear and determine the controversy and make the order which is the subject matter of this appeal?

The question is raised by objection to jurisdiction in re order to show cause dated July 7, 1945, filed by appellants herein [R. 42 and 43], and by "APPELLANTS' STATEMENT OF POINTS ON WHICH THEY INTEND TO RELY." [R. 613.]

2. Did the evidence introduced herein sustain and support the findings of fact and conclusions of law of the United States District Court, sitting as a court of bankruptcy?

The question is raised by "APPELLANTS' STATEMENT OF POINTS ON WHICH THEY INTEND TO RELY." [R. 614.]

3. Did the District Court err in modifying the findings of the Referee?

The question is raised by "APPELLANTS' STATEMENT OF POINTS ON WHICH THEY INTEND TO RELY." [R. 614.]

ARGUMENT.

I.

The District Court Had Jurisdiction to Entertain This Bankruptcy Proceeding.

A creditors' petition in involuntary bankruptcy was filed in the District Court of the United States, Southern District of California, Central Division. Thereafter, a creditors' first amended involuntary petition was filed which alleged: the necessary facts to show venue and that Abbot Kinney Company was a corporation subject to the National Bankruptcy Act and not excepted thereby; that Abbot Kinney Company was insolvent; that each of the three petitioning creditors had a provable general unsecured claim against the corporation, fixed as to liability and liquidated in amount, which in the aggregate amounted to more than \$500.00 over and above the value of securities held by them; that within four months preceding the filing of the original petition, Abbot Kinney Company, while insolvent, committed an act of bankruptcy in that it paid out certain of its assets to certain individuals on an antecedent debt; and that the payment was made for the purpose and with the intent of preferring said individuals over other creditors of the Company. [R. 5.]

Thereafter, an answer was filed by Abbot Kinney Company [R. 8] and later an amended answer was filed [R. 141].

The amended involuntary petition, and the amended answer put in issue the following points: (a) the solvency of Abbot Kinney Company; (b) the qualification of the petitioning creditors; (c) the commission of an act of bankruptcy. Upon the hearing of the issues raised

by said pleadings, Abbot Kinney Company in effect abandoned all of its defenses to the involuntary petition, except the defense of solvency. [R. 155.]

Under the above situation, Appellee respectfully submits that the jurisdiction of the District Court attached at the time of the filing of the petition in bankruptcy. From that moment, the said District Court under Section 2 of the Bankruptcy Act had full and complete jurisdiction as to the matters set forth under said section.

Appellants insist, however, that the three individuals who filed the involuntary petition were not qualified creditors, and hence there was no jurisdiction in the court. As heretofore pointed out, the creditors alleged that they had claims, fixed as to liability and liquidated as to amount, which fact was denied at the beginning by Abbot Kinney Company. The jurisdiction of this court was not dependent on whether these creditors had such claims—it had the jurisdiction to determine whether they had such claims. That was one of the issues at the outset of the case to be determined. Whether the court made a correct determination of that matter would go to the correctness of the decision and not to the jurisdiction of the court.

Appellants further assert that the petition did not state an act of bankruptcy, therefore there was no jurisdiction. Appellee further submits that the allegations of the petition in this respect apprised Abbot Kinney Company that because certain payments had been made within four months prior to the filing of the petition that petitioners claimed a preference had been effected in favor of one creditor over other creditors, and that an act of bankruptcy had thereby been committed. These allegations

complied with the general rules of pleading established by rules of Civil Procedure Rule 8. If the alleged bankrupt had desired more particularly in respect to either the qualification of creditors, or the act of bankruptcy, it could by appropriate motion have sought the same. This it did not do, but rather chose to answer. By so doing, it cured any defect as to particularity of statement, if any.

Collier on Bankruptcy, 14th Edition, Vol. 2, p. 91.

In Matter of S. W. Straus & Co., Inc. (C. C. A. 2), 67 F. (2d) 605, 24 A. B. R. (N. S.) 234, it was said (p. 609):

“The petition in bankruptcy charged as the only act of bankruptcy the giving of preferences to unknown creditors in unknown amounts, aggregating \$2500.00. Except in stating a different aggregate sum, it is identically like the petition held insufficient by this court in *Re Gaynor Homes* (C. C. A. 2d Cor.), 23 Am. B. R. (N. S.) 654, 65 Fed. (2d) 378. Hence the petition was subject to dismissal had the objection been taken in time. But as our previous decisions indicate, such a petition gives the court jurisdiction, and the defect is one which may be waived by answer and going to trial.”

Appellants further object to the qualification of the petitioning creditors on two other grounds, viz., that their claims were barred by the statute of limitations, and were such that only the trustee under the bond indenture, of which their bonds were a portion, could maintain an action.

In respect to the statute of limitations, the involuntary petition states that the bonds were due April 1, 1944 [R.

6], which, if true, would be a complete answer to any claim that the statute of limitations was a barrier to the enforcement of the bonds. It is manifest that the statute of limitation question was one for determination in the trial of the involuntary petition, and depended on the evidence adduced at such hearing. It could not go to the jurisdiction of the court to entertain the bankruptcy proceeding.

In respect to the ownership of the bonds, there is nothing in the involuntary petition to indicate other than that the creditors were the owners thereof. By virtue of fragmentary evidence, to wit, one paragraph in the trust indenture, which provides that rights of action on or because of the bonds and the trust indenture are vested in the trustee, except as otherwise provided in the indenture, Appellants urge that the creditors owned no debts. (Op. Br. 14.) They overlook other provisions of the bond indenture, however, one of which reads, "Provided, however, that nothing contained herein shall defeat the right of an individual bondholder to pursue his legal right of equitable remedy where his right of action arises out of collusion, fraud, wilful negligence, or gross misconduct." [R. 591.]

Said trust indenture also provides [R. 585-586]:

"Section III: No holder of any bond or coupon secured hereby shall have the right to institute any suit, action or proceeding at law or in equity, upon or in respect of this Indenture or for the execution (448) of any trust or power hereof or for the appointment of a receiver or for any other remedy under or upon this Indenture, unless such holder shall previously have given to the Trustee written notice of an event of default, and unless also the holders of twenty-five (25%) percent in amount of

the bonds secured hereby then outstanding shall have made written request upon the Trustee and shall have afforded to it a reasonable opportunity either to proceed itself to exercise the power hereinbefore granted, or to institute such action, suit or proceeding in itself or may, and unless also such holders shall have offered to the Trustee reasonable security and indemnity against costs, expenses and liabilities to be incurred in or by reason of such action, suit or proceeding; and the Trustee shall have refused or neglected to comply with such request within a reasonable time thereafter. Such modification, request and offer of indemnity are hereby declared in every case at the option of the Trustee to be conditions precedent to the execution of the actions and trust of this Indenture and to any action or cause of action for foreclosure or for any other remedy hereunder. It is understood, intended and hereby provided that no one or more holders of bonds or coupons shall have any right in any manner whatever (449) to affect, disturb or prejudice the lien of this Indenture by his or their action, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings hereunder shall be instituted, had and maintained in the manner herein provided for the equal benefit of all holders of such outstanding bonds and coupons.”

In the Matter of Hudson Coal Co., Debtor (U. S. D. C. Middle District of Pa.), 22 Fed. Supp. 768, 36 A. B. A. (N. S.) 896, it was contended that bondholders had no standing by reason of provisions in the mortgage to institute a suit unless it shall previously have delivered to the trustee written notice of default, or unless holders of 20% of the bonds shall have requested the trustee in writing to take action, and that no one or more holders

of bonds shall have any right in any manner whatever to disturb or prejudice the lien of the mortgage or enforce any writ thereunder, excepting in the manner therein provided. The court in said case, said (p. 770):

“On the first question, the standing of the creditor petitioners under the provisions of the mortgage to institute this proceeding under Section 77B of the Bankruptcy Act, the court is of the opinion that the provisions of the mortgage invoked in the answers of the Hudson Coal Company, debtor, and the intervening bondholders, relate to a foreclosure of the mortgage and the disturbance of the lien of the mortgage and not to a proceeding under section 77B of the Bankruptcy Act. The objection that the petitioning creditors have no standing to institute this proceeding on the ground of the provisions cited in the mortgage and the request for dismissal on this ground must, therefore, be overruled.”

It thus appears that the objections raised by Appellants do not go to the jurisdiction of the court in respect to this bankruptcy proceeding, but at most deal with problems which should be determined at the trial of the involuntary petition and the answer thereto.

The jurisdiction of the bankruptcy court is likewise not dependent upon the precision of the pleadings, but comes from the statute itself.

Collier on Bankruptcy, 14th Ed. Vol. 2, pages 13 to 16, contains an excellent discussion on this point. In part, it is there said,

“Many courts have held that jurisdiction in a proceeding for adjudication in bankruptcy ‘comes from the statutes and is not conferred by the accuracy and precision of the averments made in the

petition.’ Such a statement suggests the view that a defect in the pleading does not touch upon the court’s power to proceed but only affects the petitioner’s cause of action. No doubt such a view is commendable, inasmuch as it eliminates from the domain of pleading the dangers lurking behind such phrases as ‘jurisdictional fact’ and the like—

“It is quite evident that viewed in this varied context, the question of what is a ‘jurisdictional fact’ for purposes of pleading is not susceptible of any precise answer. There is no basis for assuming that the pleading of an act of bankruptcy, for instance, is any more ‘jurisdictional’ than the pleading of a petitioning creditor’s claim. Nor is it reasonable to suppose, on reading the Act and the General Orders, that a given defect in pleading might be ‘jurisdictional’—in any sense previously indicated—at one stage of the proceedings, and ‘non-jurisdictional’ at a subsequent state. Far more preferable is the view that defects in pleading are not ‘jurisdictional’; that whether or not they may be cured depends upon the power of amendment, and that a bankruptcy court has ample jurisdiction to permit amendments. Aside from a few isolated instances, judicial opinion amply supports these views.”

It is said in *Re Shoesmith* (C. C. A. 7), 13 A. B. R. 645, 135 Fed. 684, p. 688:

“Another question suggested at the argument has relation to the jurisdiction of the court below. It is contended that because the first petition filed by the creditor was defective, and a sufficient amended petition was filed more than four months after the last fraudulent transfer of the property, the court had no power to permit an amendment, and was therefore without jurisdiction to entertain the proceedings.

The District Court had jurisdiction of the parties. It had jurisdiction of the subject-matter. It has general and exclusive jurisdiction of bankruptcy proceedings. The objection goes to the want of equity exhibited by the petition, not to the want of power in the court. There was jurisdiction to determine the sufficiency of the petition, and it was complete to permit any amendment. The jurisdiction in such cases comes from the statute, and is not conferred by the accuracy and precision of the averments made in the petition."

In re Plymouth Cordage Co., et al., 13 Am. B. R. 665, p. 670, 135 Fed. 1000 (C. C. A. 8), it is said (p. 1004):

"The truth is that the contention of counsel for the respondent fails to distinguish between the averments essential to jurisdiction over the subject-matter and the parties and those requisite to invoke a favorable adjudication upon the petition. Jurisdiction of the subject-matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the parties to it. The facts essential to invoke this jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought. A defective petition in bankruptcy or an insufficient complaint at law, accompanied by proper service upon the defendants, gives jurisdiction to the court to determine the questions it presents, although it may not contain averments which entitled the complainant to any relief; and it may be the duty of the court to determine either the question of its jurisdiction or the merits of the controversy against the petitioner or plaintiff."

In re First National Bank of Belle Fourche, 18 A. B. R. 265, 152 Fed. 64 (C. C. A. 8), the court after discussing a defective petition in bankruptcy, states (p. 69):

“The facts which conditioned the jurisdiction of the court were the filing of the petition and the service of the subpoena.”

II.

Rights in and to Property in the Possession of the Alleged Bankrupt at the Time of the Institution of a Bankruptcy Proceeding Are Subject to Summary Determination in the Bankruptcy Court.

Upon the filing of an involuntary petition, the bankruptcy court draws to itself the exclusive jurisdiction to determine all questions concerning the right, title or interest in or to property in the possession of the alleged bankrupt at that time, or later coming into the possession of the court. The above proposition is thoroughly established.

In *Murphy v. Hofman*, 211 U. S. 562, 53 L. Ed. 327, 28 S. Ct. 154, 21 A. B. R. 487, it is said (p. 568):

“But, where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, Federal or State. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the

jurisdiction of all other courts. The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 52 L. Ed. 379, 386, 28 S. Ct. 182. . . .

Accordingly, where property was in the possession of the bankrupt at the time of the appointment of a receiver it was held that the bankruptcy court had jurisdiction to determine the title to it as against an adverse claimant, and that the receiver had no right to deliver it to him without the order of the court. *Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157, 25 S. Ct. 778, 14 A. B. R. 45."

In *Isaacs v. Hobbs, Tie & Timber Co.*, 282 U. S. 734, 75 L. Ed. 645, 51 S. Ct. 270, 17 A. B. R. (N. S.) it is said:

"This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts, which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear

and determine all questions respecting title, possession and control of the property.”

In re Baldwin, 291 U. S. 610, 78 L. Ed. 1020, 54 S. Ct. 551, 24 Am. B. R. (N. S.) 487, it is said (p. 615):

“All property in the possession of a bankrupt of which he claims the ownership passes, upon the filing of a petition in bankruptcy, into the custody of the court of bankruptcy. To protect its jurisdiction from interference, that court may issue an injunction. The power is not peculiar to bankruptcy or to the federal courts. It is an application of the general principle that where a court of competent jurisdiction has, through its officers taken property into its possession, the property is thereby withdrawn from the jurisdiction of other courts. Having possession, the court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting same. . . . The jurisdiction in such cases is exclusive of the jurisdiction of other courts, although otherwise the controversy would be cognizable in them.”

Because of the exclusive nature of the jurisdiction of the bankruptcy court, Abbott Kinney Company could have resorted to no other court to protect its interest in connection with the fraud perpetrated by appellants and John Harrah because both the sprinkling system and the \$30,000 which are in dispute herein were in the possession of Abbott Kinney Company at the time of the filing of the involuntary petition in bankruptcy. [R. 17, 205; Op. Br. 7.]

III.

The Alleged Bankrupt Was a Proper Party to Institute These Proceedings.

Appellants argue that the alleged bankrupt cannot institute proceedings to recover a preference and to quiet title and establish a trust against an adverse claimant prior to adjudication. (Op. Br. 19.) Such argument is untenable herein, however, since it is not a preference that is sought to be recovered. Furthermore, appellants are not adverse claimants in the sense that term commonly denotes, namely, parties asserting rights to property *not* in possession of the bankruptcy court. This is a proceeding to adjudicate the rights of parties to properties in the possession of the bankruptcy court, and to a fund held by the alleged bankrupt at the time of the institution of the bankruptcy proceedings, and now in actual possession of the Clerk of the Bankruptcy Court. Generally, Appellants claim that the right to institute proceedings lies only in a receiver or a trustee, and not in the alleged bankrupt. They argue that because the act conferring powers on the receivers and the trustees says nothing about the bankrupt, that it must follow that the bankrupt has no such right. Receivers and Trustees are officers of the court, whose powers are conferred by statute, and thus it was necessary to specifically grant such powers. Such was not the situation with the bankrupt.

In Collier on Bankruptcy, 14th Edition, Vol. 1, on page 1176, it is said:

“Section 11c is silent as to the right of the bankrupt himself to begin a suit in the time which intervenes between the filing of the petition and the appointment and qualification of the trustee, but the

weight of authority is that since the bankrupt is not divested of his title under Sec. 70a until such appointment and qualification, he may commence a suit or proceeding during that interval."

In *Johnson v. Collier*, 222 U. S. 538, at 539 and 540, it is said:

"While for many purposes the filing of the petition operates in the nature of an attachment upon choses in action and other property of the bankrupt, yet his title is not thereby divested. He is still the owner, though holding in trust until the appointment and qualification of the trustee, who thereupon becomes 'vested by operation of law with the title of the bankrupt' as of the date of adjudication.

"Until such election the bankrupt has title-defeasible, but sufficient to authorize the institution and maintenance of a suit on any cause of action otherwise possessed by him. It is to the interest of all concerned that this should be so. There must always some time elapse between the filing of the petition and the meeting of the creditors. During that period it may frequently be important that action should be commenced, attachments and garnishments issued, and proceedings taken to recover what would be lost if it were necessary to wait until the trustee was elected."

To the same effect is *Danciger and Emerich Oil Company v. Smith*, 276 U. S. 542, and a number of other cases cited on page 1176 of Vol. 1, 14th Edition of *Collier on Bankruptcy* in support of the quotation above given.

Appellants state that a dangerous precedent will be established and departure from rule had, if the bankrupt is permitted, prior to an adjudication, to litigate over assets

of the estate. As is disclosed from the foregoing quotation from Collier, and the decisions of the United States Supreme Court, instead of a precedent, the established rule is that such proceeding may be instituted. As a matter of fact, it would be dangerous precedent to establish a rule that such litigation might not be instituted since property might be lost to the estate if the bankrupt were not permitted to institute such litigation.

Authorities cited by Appellants are not in point. (Op. Br. 19-23.) Section 23(b) of the Bankruptcy Act simply provides for the forum for suits by the receiver or trustee. It does not deal with summary proceedings brought in the bankruptcy court in relation to property in possession of the court. Section 60 of the Bankruptcy Act merely defines preferences, and provides for their avoidance by the trustee. Other cases cited deal with rights conferred upon the trustee. Also cases are quoted which show that a receiver, prior to the amendment of 1938, could not institute action. That is because a receiver is an officer of the court, and his powers are limited by statute and prior to 1938 no such power had been conferred upon receivers. This is not the case, however, with respect to the bankrupt as heretofore set forth. *In re Vancouver Book & Stationery Co. Inc.*, 48 Fed. Supp. 799, relied on by appellants, likewise deals with a preference. In the present case the element of a preference is not involved. This cause of action is based on the fraud of the appellants and John Harrah and the violation of fiduciary duties. Hence the right of recovery is not one that exists only by virtue of the bankruptcy act, and is not one that is dependent on the solvency or insolvency of the bankrupt.

IV.

The Court Did Not Err in Denying a Creditor the Right to Intervene and Oppose the Involuntary Petition. Furthermore Such Matter Is Not Properly Before the Court on This Appeal.

Appellants urge that the court erred in denying a creditor the right to intervene and in not granting the motion to dismiss the involuntary petition. (Op. Br. 29.) The petition to intervene and the motion made were not part of the proceeding in connection with the order which is the subject matter of this appeal. They were collateral matters in connection with the involuntary proceeding in bankruptcy, and no appeal has been taken from the order made in respect thereto. Consequently, we fail to see how the same are pertinent herein. However, it is plain that the court below was correct in its ruling in regard to such petition and motion.

Prior to 1938, and before the amendment to the National Bankruptcy Act by the Chandler Act, a creditor had the right under Sec. 18b of the Bankruptcy Act to plead to the involuntary petition in bankruptcy in opposition thereto. Section 18b was amended so as to take away that right.

In the *Matter of George A. Carden, Bankrupt* (C. C. A. 2), 118 F. (2d) 677, 45 Am. B. R. (N. S.) 258, the court had occasion to consider the effect of the amendment. This was a case where an involuntary petition, signed by the petitioning creditors about a year before it was filed, lay dormant without service for some years, and when an order was obtained for an alias subpoena. The alias subpoena was issued, served upon the bankrupt and he was adjudicated upon his default. The appellant therein

was a creditor of the bankrupt who obtained an order to show cause why the petition should not be dismissed, which was denied upon the ground that a creditor had no standing to contest the allegations of the petition. The court then said (p. 679),

“The issues are whether a creditor may, since the Chandler Act amended Section 18(b) of the old Bankruptcy Act, appear and plead to the petition and, if not, whether the court had jurisdiction to make the adjudication upon it.”

“The old Act provided in section 18-b that the bankrupt or any creditor might appear and plead to the petition with five days after the return date or within such further time as the Court might allow. In Section 18(b) of the Chandler Act this provision was changed by omitting the words ‘or any creditor.’ Similarly, section 59f of the old Act gave creditors, other than the original petitioners, the right to enter their appearance at any time and join in the petition or file an answer and be heard in opposition to the prayer of the petition. In section 59(f) of the Chandler Act the words ‘or file an answer and be heard in opposition’ were left out. These omissions make it clear that Congress did not intend to give a statutory right to creditors to contest the allegations in an involuntary petition. We must take it for granted that the District Court held that the application of the Chandler Act was feasible since it was actually applied and there is no question as to the soundness of that ruling.

“Since there is no longer any express statutory right given creditors to contest an adjudication upon an involuntary petition in bankruptcy, the right, if any, of creditors to make such a contest must rest

upon general principles of equity applicable in bankruptcy proceedings. It is true that such principles will govern action in a bankruptcy court when not in conflict with the statute. *Securities Comm. v. U. S. Realty Co.*, 310 U. S. 434, 457, 42 Am. B. R. (N. S.) 602, at page 617. But where there has been an amendment to the statute whereby such right formerly existent has been withdrawn, there has been the equivalent of a statutory denial of the right and any action under general principles of equity contrary thereto would be contrary to the statute and so erroneous. Consequently, the appellant was without standing to question the sufficiency of the petition."

V.

There Was No Repudiation of Stipulation Re Deposit of Money.

Appellants are in error in stating that there was a repudiation of a stipulation. Appellants state that the \$30,000.00 now in the possession of the bankruptcy court was placed there by an adverse claimant under a stipulation that it should be held until the question of whether Abbott Kinney Company was a bankrupt was determined. The \$30,000.00 mentioned was paid out by the Executive Committee of the alleged bankrupt after the filing of the petition in bankruptcy. At the time of the payment, it was *custodia legis*, and in the exclusive and complete jurisdiction of the bankruptcy court. Consequently, Brown to whom it was paid was not an adverse claimant, as adverse claimant is used in connection with the exercise of jurisdiction. Furthermore, the stipulation did not provide that the determination of the ownership of said \$30,000.00 must await the determination of the bankruptcy petition. It is true the stipulation set a time limit of ten days after

the adjudication or the dismissal of the bankruptcy proceeding within which time steps would have to be taken with regard to the disposition of the \$30,000.00, or else disposition should be made in accordance with the stipulation. However, it did not say or infer that a proceeding might not be commenced prior to hearing on the involuntary petition. It simply prescribed an extreme limitation within which the fund might be held without action being taken.

In addition to being the recipient of said sum of \$30,000.00 paid to him after bankruptcy, and thereafter placed under the stipulation with the Clerk of the Bankruptcy Court, Brown was likewise a party to the involuntary proceedings, in that it was therein alleged he was the recipient of a preference. The stipulation provided that said petition in bankruptcy should be prosecuted with due diligence. At the time the stipulation was entered into, there was a pending motion [R. 163] by the bankrupt to dismiss the involuntary petition. After the stipulation was entered into, the petitioners in the involuntary proceeding filed an amended petition, and answer to said amended petition was filed. One of the main issues in connection with said involuntary petition was the question of the solvency or insolvency of the corporation. In fact, by the time the trial stage was reached that was the only issue. [R. 155.]

The prime factor in the determination of the solvency or insolvency was the ownership of said sum of \$30,000.00, and whether or not the alleged bankrupt owned the sprinkling system free and clear of claim of lien thereon or thereto. [R. 155.] The determination of such ownership was sought through the proceedings now under re-

view as an expeditious and proper method of securing such determination.

In respect to said stipulation, while there appears to be a dispute between the parties thereto as to the time within which proceedings might be instituted to determine the ownership of the said deposit, there can be no dispute as to the express stipulation that the District Court should determine the ownership, unless that Court decided it did not have jurisdiction. The parties to the stipulation precluded themselves from urging the court not to exercise a discretion in accepting a determination of the ownership, but bound themselves to accept a determination if the court decided it had jurisdiction. If it should be deemed that appellee is mistaken in its construction of the stipulation as to the time of commencement of proceedings, nevertheless no real injury was suffered by appellants in that the District Court, even if the proceeding were dismissed, did have jurisdiction to determine such ownership.

In *In re Antigo Screen Door Co.*, 10 A. B. A. 359 (C. C. A. 7), 123 Fed. 249, at p. 251 :

“This being done, and the fund being placed in the registry of the bankruptcy court and in the bankruptcy proceedings, did that court have the right to determine, as a court of bankruptcy and in the bankruptcy proceedings, the respective rights of the parties to that fund? We take it that any court, whether one of equity, common law, admiralty or bankruptcy, having in its treasury a fund touching which there is dispute, may, by virtue of its inherent powers, determine the right to the fund thus in its possession. Jurisdiction in that respect is an incident of every court. *Havens & Geddes Co. v. Pierck, Trustee* (C. C. A.),

9 Am. B. R. 569, 120 Fed. 244; *In re McCallum* (D. C.), 7 Am. B. R. 596, 113 Fed. 393. If otherwise, every court would be subject to the control of the co-ordinate courts, working havoc to the independence of judicial authority. A fund so possessed, is in *custodia legis* and right to it may only be asserted and determined in the court which possesses it."

In the Matter of Rose Packard Shyvers, 43 A. B. R. (N. S.) 128, D. C. Cal. 33 Fed. Supp. 643, a case where a proceeding under Section 75 of the Bankruptcy Act was dismissed on the ground that the bankrupt-debtor was not a farmer and the fund remained in *custodia legis*, the court said (p 644):

"But assuming that the matter was not pending, still it was the duty of the bankruptcy court, a court of equity, to administer the funds held in *custodia legis*, distributing them to such of the parties, as, after due hearing, might show themselves entitled thereto. This high duty of a court of equity continues after a dismissal of the action on any ground. Especially is this true where, as here, the bank was claiming a lien on the funds in perfect good faith, as shown by the proceedings before the conciliation commissioner. Even though the proceeding be dismissed, the court has ample power to determine their disposition after notice to all parties interested. *Jackson v. Lynch* (C. C. A. 9th Circ.), 43 Am. B. R. (N. S.) 82, 111 F. (2d) 1003, decided May 10, 1940; *Remington on Bankruptcy*, Fourth Edition, section 458; *In Re Winship* (C. C. A. 7th Cir.), 9 Am. B. R. 638, 120 Fed. 93. Similarly may be cited *Pacific Bank v. Madera Fruit Co*, 124 Cal. 525."

VI.

Dismissal of Bankruptcy Proceeding After Order Adjudicating Rights of Ownership in Fund Does Not Vacate Such Order.

Appellants urge that the court erred in not granting their motion to dismiss the entire proceeding relating to the order to show cause and the order to the Referee. (Op. Br. 28.) Appellee knows of no such motion of the appellants. It is true that one Harold B. Poole, a purported creditor filed a motion to dismiss the involuntary petition. [R. 145.] Such motion, however, was made prior to the determination by the District Judge on the review of the Referee's order. Furthermore, no appeal has been taken from the order in respect to such motion. The order of the Referee in this case was made on August 23, 1945, some months prior to the time the special master recommended a dismissal of the involuntary petition on the ground of the solvency of the corporation, and many months prior to the order of the judge approving the special master's report.

It is only common sense that if orders made in the course of a bankruptcy proceeding were to be set aside merely because of a holding that the alleged bankrupt is not insolvent, there would be the utmost confusion in bankruptcy administration. For example, a receiver under the Act is authorized to institute proceedings. In the great majority of cases, the receiver is acting during the time that the involuntary proceeding is pending and before the determination. Can it be said that those orders made during the course of that proceeding, and while the property is under the jurisdiction of the court should be set aside because, perchance, it is later ascertained that the alleged

bankrupt is solvent. The very statement of it would seem to indicate it to be otherwise. The District Judge in his opinion, said:

“An involuntary petition in bankruptcy has been filed against a corporation within this jurisdiction by three persons who represent that they are creditors and an act of bankruptcy is alleged. True, they may ultimately be determined to be secured creditors and could not qualify as petitioning creditors. On the other hand, they might show that their alleged security was valueless. They might not be able to support the alleged act of bankruptcy, but, while the proceeding was before the bankruptcy court, the bankruptcy court was a court of competent jurisdiction to determine matters pertaining to the property of the bankrupt, and property found in the possession of the bankrupt. No other court during the pendency of the proceeding could, without the consent of the bankruptcy court, entertain litigation in connection with the property of the alleged bankrupt. (*Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734.)

“During the pendency of the proceedings, it would be quite possible and proper for persons to appear in this proceeding claiming to own property in the possession of the bankrupt and request that their property be released to them, and should the court upon the said hearing determine that they were not entitled to the return of the property, and it belonged to the bankrupt, such a determination would be *res adjudicata* in any subsequent proceedings.” [R. 180-181.]

See

Sylvan Beach, Inc. v. Kenneth Koch et al., 140 F. (2d) 852, 55 Am. B. R. (N. S.) 409,

where at page 861 (Fed.) it is said:

“At the time the petition of the Wiemeyers to recover their real estate, and the motion of Koch and Dalton, trustees, to dismiss the reorganization proceeding and to recover the property covered by the deed of trust, were heard, the court below had power to determine whether the Wiemeyers were entitled to the return of their real estate and to the cancellation of their lease, and to decide whether the estate of the debtor had assets which belonged to Koch and Dalton, as trustees, and which should be delivered to them. The court also had power to determine whether the debtor could or could not be reorganized under the Bankruptcy Act, and whether the proceeding had been conducted in good faith or was a fraud upon the court and upon the creditors. . . .”

and at page 862, it is said:

“The judgment granting to the Wiemeyers possession of their real estate and cancelling the ninety-nine year lease should, we think, be sustained. It is true that the ‘judgment’ dismissed, for want of jurisdiction, the proceeding as one for corporate reorganization, before granting the relief requested by the Wiemeyers in their petition, but, as we have pointed out, the court had jurisdiction to grant the Wiemeyer’s petition for possession of their real estate and did grant it.”

VII.

John Harrah and Gerety Each Bore a Fiduciary Relationship to Abbot Kinney Company Which Each Violated, to the Damage of Abbot Kinney Company.

(a) John Harrah Bore a Fiduciary Relationship to Abbot Kinney Company.

Appellants admit that John Harrah was on the Board of Directors and a member of the Executive Committee of, and that he bore a fiduciary relationship to, the Abbot Kinney Company during the controversial period. (Op. Br. 36.) Such being the case, appellee need only point out wherein John Harrah violated his fiduciary obligation.

The Referee found that John Harrah's violation consisted of participating and being the moving force in a conspiracy to cheat and defraud Abbot Kinney Company [R. 72] by having the Executive Committee refuse to purchase the sprinkling system contract, and then having Brown, as undisclosed agent of the conspirators, purchase the sprinkling system contract at as low a figure as he could negotiate and to thereafter have the Executive Committee pay off the contract to Brown as rapidly as possible. [R. 66.] The evidence overwhelmingly supports these findings.

(b) Brown Was an Undisclosed Agent for John and William Harrah.

John Harrah filed a personal voluntary petition in bankruptcy in 1937 but was unable to get relief, although he applied for the same. [R. 297.] Thereafter, he supposedly devoted his entire time, effort and energies to the business of his son, William Harrah. [R. 296, 297.]

About that time Brown came into the picture as the confidant and trusted employee of William Harrah [R. 37] dealing in most instances directly with John Harrah. He had access jointly with John Harrah to William Harrah's safe from which he could remove money at will. [R. 233, 234, 517.] Deals would be negotiated on behalf of William Harrah by John Harrah and then taken in the name of Brown [R. 501-505] and thereafter Brown would confer with John Harrah as to how the business should be operated. [R. 240.] Brown conferred with John Harrah prior to and during negotiations for the purchase of the sprinkling system contract. [R. 252.]

Certainly the foregoing evidence, when coupled with the offer made by John Harrah to Frank Williams and Lou Halper (after Brown supposedly owned the sprinkling system contract) to sell them the same percentage of interest therein as they each held in the bond pool and with the further statement by John Harrah that he "controlled" the sprinkling system contract [R. 514, 515, 523, 524], leads to only one conclusion and that is that after John Harrah was denied his discharge in bankruptcy, he carried on much of his business activities through and in the name of Charles Brown.

The evidence justifies the conclusion that William and/or John Harrah put up at least \$5,000 of the \$10,000 supposedly paid by Brown for his share of the sprinkling system contract. Brown and Gerety both testified that Brown used two cashier's checks. On close examination

by Referee Brink, Brown was unable to explain why he had obtained two cashier's checks instead of one. [R. 289-292, incl.] Certainly a business man would not ordinarily buy two cashier's checks from the same bank at the same time, payable to the same person, to pay one obligation. The obvious explanation of Brown's actions is that Brown took at least \$5,000 out of Harrah's safe and used it as part of the purchase price. This conclusion is strengthened by Al Newton's testimony that Gerety told him that the sprinkling system contract had been purchased by Brown, Gerety and "somebody else" [R. 499], and by the purported subsequent assignment on Nov. 25, 1944, by Brown of an undivided one-third interest in the remainder of the sprinkling system contract to William Harrah. [R. 109, 280 to 285, incl.]

Referee Benno Brink, in orally commenting on this phase of the case at the close of the trial, stated in substance as follows:

"I am not convinced that Brown has the slightest monetary interest in this transaction. We have a situation here which we sometimes find where a man in financial difficulties seeking relief from the bankruptcy court, is denied that relief. He thereafter functions through a close relative. It is elementary in the bankruptcy court that these are suspicious circumstances. Here is Brown, a very likeable gentleman. He does not give the impression, however, that he would gamble \$10,000 of his own money on a contract upon which nothing has been paid since 1932. Nor do I believe he did it. I think the thing is a Harrah deal first, last and all the time." [R. 608-609.]

(c) **A Conspiracy to Cheat and Defraud Abbot Kinney Company Existed Between Appellants Herein and John Harrah.**

It is well settled in California that in cases of conspiracy to defraud it is not expected that direct evidence of the conspiracy can be secured. This question was thoroughly discussed in the case of *Johnstone v. Morris*, 210 Cal. 580 (292 Pac. 970), where the court said at page 590:

“In cases of conspiracy to defraud it is not to be expected that direct evidence of the conspiracy can be secured, because such evidence could usually only be secured in the event one of the conspirators confessed. The jury may infer the conspiracy from all the circumstances, and if the inference is a reasonable one it will not be disturbed on appeal. These principles have repeatedly been recognized by this court. In *Revert v. Hesse*, 184 Cal. 295, at 301 (193 Pac. 943, 946), this court, quoting from a Georgia case, said:

“ ‘The law recognizes the intrinsic difficulty of proving a conspiracy. The allegations with reference to conspiracy are treated as matters of inducement leading up to a more particular description of the acts from which conspiracy may be inferred. . . . The conspiracy may sometimes be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances. . . . ’

“On the same page (301) the court continued as follows:

“ ‘In the present action, while plaintiff was unable to prove any formal agreement between defendants Arthur Hesse and Sidney Beach, nevertheless, there

was before the court the entire transaction resulting in the consummation of a flagrant fraud upon the plaintiff, in which transaction Sidney Beach participated as an intermediary. . . . These circumstances, coupled with the further fact that defendants Sidney Beach and Arthur Hesse were not strangers, but were no more or less intimate terms, occupying the same office, were sufficient to warrant the inference drawn by the trial court that defendant Sidney Beach was a party to a conspiracy which had for its object the fraudulent conversion complained of by plaintiff.'

"In *Beeman v. Richardson*, 185 Cal. 280, at page 282 (196 Pac. 774, 775), the rule is stated as follows:

" 'The point in connection with the finding as to a conspiracy is that the representations were made by the defendant, Richardson, alone, and that there is no direct evidence that the other defendants agreed that they should be made, or knew at the time that they were being made. But direct evidence of that character could hardly be had in the very nature of things, unless one of the defendants should confess, and the fact must be determined by the inference naturally and properly to be drawn from those matters which can be, and are directly proven.'

"Under the evidence partially summarized, *supra*, the inference of joint fraud was not unreasonable, and will not be disturbed on appeal."

It is hard to believe that John Harrah, who was interested primarily in the bonds of the Abbot Kinney Company [R. 508, 509, 122, 492, 493, 513] would eagerly pay out \$37,500 cash of the Abbot Kinney Company on

a contract which had been offered to the Abbot Kinney Company for \$10,000 on two different occasions [R. 491, 496, 497, 498], which had been in default for many years [R. 303, 388], which was junior in position to the bonds [R. 492, 493], and which was purchased for only \$15,000 [R. 256, 258], unless he was benefitting thereby. His admission to Lou Halper and to Frank Williams that he "controlled" the contract [R. 514, 515, 523, 524] is the only explanation for John Harrah's actions.

Brown would not have risked \$10,000 which, according to his own evidence, represented a substantial portion of his assets [R. 221-232, incl.] on a sprinkling system contract which had long been in default and junior to a large bonded and tax indebtedness, unless he had absolute assurance that someone in authority in Abbot Kinney Company would protect him against loss, or unless he was not risking his own money but was merely acting as agent for and under the direction of someone else.

Gerety, in his capacity as manager, state receiver, trustee and again manager of Abbot Kinney Company continuously since 1926 [R. 433-436, incl.], could not help but know: that Abbot Kinney Company had paid no bonded interest since 1932 and owed more than \$75,000 in taxes, \$269,000 principal of bonds, and in excess of \$225,000 in bond interest; that the sprinkling system contract was junior to the bonds, had been in default since 1932 and had been offered to Abbot Kinney Company for \$10,000, but had been refused by John Harrah; that Lou Halper and John Harrah were primarily interested in protecting the bond position and had refused to pay anything on account of the sprinkling system contract although many requests for payment had been made by

Cruickshank & Co. With this knowledge, Gerety would not have risked \$5,000 to purchase a one-third interest in said sprinkling system contract, unless he had a commitment from John Harrah which assured his reimbursement and a nice profit.

Referee Brink, in his oral summation on this phase of the case, stated in substance as follows [R. 605 to 608, incl.] :

“I am satisfied beyond a reasonable doubt that here was an unconscionable conspiracy and confederation, headed by John Harrah, to gain an advantage for himself over the other people with whom he was connected in Abbot Kinney Company. For many years he had taken the position, and with sound reason, that no money should be paid on the sprinkling system contract unless absolutely necessary since it would be disadvantageous to the bondholders. He had a right to take that position. Everyone connected with the set-up knew that he represented the bondholders. The other people in the picture were able to take care of themselves. Therefore, it cannot be said that John Harrah was recreant in his duty because he looked out for the bondholders. In spite of this, we find that no sooner had the sprinkling system contract been purchased, than \$7500 is paid on account. Now why? Because, by a strange coincidence, the Cruickshank Company had at the same time, sent a letter threatening to turn off the water. The attorney who prepared that letter and caused it to be sent, testified it was merely for the purpose of establishing a technical default. So Brown walks into a meeting of the Executive Committee, at which all members of the committee are not present, and

says, 'I am going to turn off the water unless I get \$7500; and if I get \$7500, I won't turn it off for three months hence.'

John Harrah had known all through the years that under the terms of the sprinkling system contract there was a provision that the water could be turned off, the pipes repossessed and the system torn out. It wasn't any news to him. I venture to say that if a representative of Cruickshank & Co. or anyone other than someone John Harrah was in league with had walked in and made such demand, John Harrah would have literally thrown him out of the office. He wouldn't have received a dime. But imagine—although John Harrah knew that there were forces in the corporation that had been urging that the corporation purchase the sprinkling system contract for the nominal sum of \$10,000, still John Harrah, with the assistance of Carleton Kinney, who permitted himself to be used in the matter, immediately wrote out a check for \$7500 without even getting back a statement from Brown to the effect that at least three months' grace would be given. Then when John Harrah knew that his power as a member of the Executive Committee was to end the next day, Brown again, by a strange coincidence, writes a demand dated November 6th for \$30,000. John Harrah again with the gracious assistance of Carleton Kinney, immediately writes out a check for \$30,000 and delivers it to Brown. They were in such a hurry to get the check cashed by the bank that the physical evidence shows that the check was never even folded once, nor one even as much as put it in his pocket or in his purse or billfold. It was either delivered directly to the banking house of the Security Bank or was taken post-haste by Brown to the bank in order to get it in his account or cash it.

If John Harrah were not an interested party in this transaction, would he have forthwith paid that \$30,000? Certainly there would have been every reason favoring his delay until the next day when he could place the responsibility on the shoulders of the stockholders. No man would have assumed that responsibility of paying out \$30,000, at least 75% of all the cash resources of Abbot Kinney Company, at that time. Particularly in view of his interest as a bondholder in Abbot Kinney Company. The conclusion is inescapable that this is an unconscionable deal engineered by John Harrah.”

(d) Gerety Bore a Fiduciary Relationship to Abbot Kinney Company.

Appellants contend that Gerety owed no fiduciary obligation to Abbot Kinney Company. The very statement of his position, however, is a complete answer to their contention.

Gerety was first employed as general manager of Abbot Kinney Company in 1926. He held that position until 1932 when he was appointed its Receiver. He continued as Receiver until 1937 when he was appointed its Trustee in Bankruptcy under 77B proceedings. This proceeding was shortly dismissed and Gerety was again appointed the general manager which position he held until November 15, 1944. [R. 433 to 436, incl.] The above facts are not in dispute.

Alfred A. Newton described the duties of Gerety as manager substantially as follows [R. 490]:

“Gerety’s duties as manager were to represent the company before meetings at which the company had to be represented, to take up tax matters before the Board of Supervisors, to hire and fire employees, to

recommend to the Board of Directors and to the Executive Committee deals for the sale and leasing of property, and to handle all of the normal business of the company—Whenever the company dealt with the tenants, Gerety made his recommendations, carried out the instructions given him, or took whatever action was necessary.”

Brown testified that whenever he wanted anything from, or information regarding Abbott Kinney Company, he went to Gerety, who so far as Brown knew, was in full charge of the activities of Abbot Kinney Company. [R. 241.]

Gerety testified that he had charge of the office, looked after the workmen [R. 434], carried on negotiations for leases, saw that they were performed by the tenants [R. 444, 445]; that he had the books of Abbot Kinney Company under his control and direction. [R. 437.] Thus, Gerety’s position with Abbot Kinney Company was one of trust and confidence.

In such position Gerety was obligated to be candid with the officers and directors of Abbot Kinney Company on any business of the company. In violation of that obligation, Gerety deliberately misled Al Newton, a director and member of the Executive Committee of Abbot Kinney Company.

Al Newton testified that he had a conference with Gerety on Tuesday, June 6, 1944, at which time he told Gerety that he thought Abbot Kinney Company should purchase the sprinkling system contract for \$10,000 and requested Gerety’s help in persuading John Harrah to consent to it, to which Gerety agreed. [R. 496.] Seven days later Gerety, according to his own admission, bought

the contract for his own account and the account of others after having carried on negotiations for several days. [R. 256, 258, 448.]

If Gerety had performed his fiduciary obligation to Abbot Kinney Company, he would have told Newton at that time that he, Gerety, Brown and someone else, were seriously negotiating for the purchase of the sprinkling system contract, and that he wasn't interested in, nor would he endeavor to persuade John Harrah to consent to its purchase by Abbot Kinney Company.

Appellee respectfully submits that there could be no more flagrant violation of a fiduciary obligation than the one in which Gerety participated. It was just another element, however, of the conspiracy. Certainly this evidence is more than sufficient to support the finding that Gerety violated his fiduciary obligation to Abbot Kinney Company.

Aside from Gerety's specific obligation to be candid with Newton, and assist him in his effort to protect the interests of Abbot Kinney Company when specifically requested to do so, Gerety should not be permitted to profit at the expense of his principal, who for these past many years has maintained him in a position of confidence. We do not believe that any of the cases cited by appellants justifies Gerety buying an interest in the sprinkling system contract for his own account without first receiving a complete approval so to do from Abbot Kinney Company.

(e) Gerety Participated in and Was a Part of the Conspiracy.

According to Brown, it was Gerety who first called the sprinkling system contract to Brown's attention and made the date with Hugh Darling to discuss its purchase. [R. 242, 245, 252, 253, 448.] Gerety told Brown that from his (Gerety's) past experience and connections with Abbot Kinney Company, he felt the sprinkling system contract was good. [R. 249.] Gerety participated in the negotiations with Hugh Darling to purchase the sprinkling system contract. [R. 254, 255.] After the negotiations were started, it was Gerety who received word from Darling that the sprinkling system contract could be purchased and the price therefor. [R. 257.] Gerety agreed that the assignment would be taken in Brown's name alone and that Brown would thereafter assign a one-third interest therein to Gerety. [R. 260.] Gerety knew how much money Abbot Kinney Company had when the sprinkling system contract was purchased. [R. 450.] When the first demand was made upon Abbot Kinney Company for payment on account, Gerety suggested to Brown that they ask for \$7500. [R. 264.] Gerety received \$2500 of the first payment of \$7500. [R. 267] and \$10,000 of the second payment of \$30,000. [R. 279.] Gerety and Brown discussed the demand for \$30,000 before Brown made it. [R. 457.] Gerety received the notice to Abbot Kinney Company from Cruickshank & Co. stating that it was going to turn the water off. [R. 332.] Gerety was familiar with the financial status of Abbot Kinney Company and always knew how much money was on hand. [R. 344.] Gerety told Brown the sum Abbot Kinney Company had on hand when the demand for \$30,000 was made. [R. 347.]

Thus, Gerety played a major role in formulating and consummating the conspiracy.

(f) **Neither John Harrah Nor Gerety Could Traffic in Claims Against Abbott Kinney Company.**

It is well settled that a fiduciary cannot purchase the debts of his corporation at a discount. Particularly is this true where the corporation is insolvent. This was clearly pointed out in *Davis v. Rock Creek L. F. & M. Co.*, 55 Cal. 364, 36 Am. Rep., where the court said:

“The law, for wise reasons, will not permit one who acts in a fiduciary capacity thus to deal with himself in his individual capacity. The position of A. Wolf as a member of the firm of A. Wolf & Co., and his position as trustee and president of the corporation defendant, were inconsistent and conflicting. In purchasing the debts of the corporation in his individual capacity, it was to his interest to buy them at as great a discount as possible. The greater the discount the greater his gain. If he succeeded in purchasing the debts at ANY discount, to that extent he secured to himself an advantage not common to all of the stockholders. To permit this to be done would be to permit the violation of one of the plainest principles of equity applicable to trustees. . . . (Andrews v. Pratt, 44 Cal. 309; San Diego v. S. D. and L. A. R. R. Co. 44 id. 106; Wilbur v. Lynde, 49 id. 290; Picket v. School District No. 1, 25 Wis. 552; Cumberland Coal Co. v. Sherman, 30 Barb. 553; Aberdeen Railway Co. v. Blakie, 1 MacQueen, 461; Field on Corp. Sec. 174 and 175, and authorities there cited.)”

In *Lowe v. Copeland*, 125 Cal. App. 322 (13 Pac. (2d) 522), the court said:

“The president and the directors of a corporation occupy a fiduciary and trust relationship thereto (*Sims v. Petaluma Gas-Light Co.*, 131 Cal. 656 (63

Pac. 1011); *Pacific Vinegar etc. Works v. Smith*, 145 Cal. 352 (104 Am. St. Rep. 42, 78 Pac. 550), and they are not permitted to assume a position adverse to the corporation (*Dean v. Shingle*, 198 Cal. 652 (46 A. L. R. 1156, 246 Pac. 1049)). Transfers of corporate property by such officers to themselves are voidable (6a Cal. Jur., Corporations, sec. 633; *Phillips v. Sanger Lumber Co.*, 130 Cal. 431 (62 Pac. 749); *Dean v. Shingle*, *supra*); and a trust arises in favor of the corporation as against an officer as to anything so received (*Lezinsky v. Mason Malt etc. Co.*, 185 Cal. 240 (196 Pac. 884)).”

Also in *Bonney v. Tilley*, 109 Cal. 352 (42 Pac. 439), it was stated:

“It seems to be well settled that directors of an insolvent corporation, who are creditors of the company, cannot secure to themselves any preference or advantage over other creditors in the payment of their claims. (*Hays v. Citizens’ Bank*, 51 Kan. 535; *Beach v. Miller*, 130 Ill. 162; 17 Am. St. Rep. 291; *Adams v. Kehlor Milling Co.*, 35 Fed. Rep. 433; *Hopkins’ Appeal*, 90 Pa. St. 69.)

In *Cook on Stock and Stockholders*, section 660, it is said: ‘It is a fraud on the corporation and on corporate creditors for the directors to buy up at a discount the outstanding debts of the corporation and compel it to pay them the full face value thereof. In such a case the directors may be compelled to turn over to the corporation the evidences of indebtedness upon being paid the money which they gave for the same.’ ”

See also *Kahle v. Stephens*, 214 Cal. 92 (4 Pac. (2d) 145).

It is to be noted that under the California definition of insolvency, Abbot Kinney Company was insolvent in that it was unable to pay its debts from its own means, as they became due. (Code Civ. Proc. 3450 and 1796(3).)

The evidence is uncontroverted that Abbot Kinney Company had not been able to pay its taxes, its bond interest or the sprinkling system contract, from its own means, as they became due. On this subject John Harrah testified that the operation of Abbot Kinney Company was not profitable, that the company had paid nothing on its bonds since 1932, and that the tax situation had been very bad. [R. 305.] Therefore, under the laws of California, Abbot Kinney Company has been insolvent ever since 1932. The insolvency of Abbot Kinney Company is a complete answer to all of the cases relied upon by Appellants in their Opening Brief in support of their argument that Gerety as manager had a right to traffic in the claims of the Abbot Kinney Company. (Op. Br. 40-46, incl.) None of said cases justifies a director or confidential employee dealing in claims against his corporation where it is insolvent. There is another complete answer to such cases in that each thereof is also predicated upon the further premise that there was an "absence of fraud" on the part of such director or employee. For example, the case of *Todd v. Temple Hospital Assn. Inc.*, 96 Cal. App. 43, (273 Pac. 595) (Op. Br. 42), the District Court of Appeal said:

"In the absence of fraud or inequitable circumstances (italics ours) the rule that it is a violation of his trust for an officer to deal with the corporation applies only where his conduct is in the nature of an attempt to unite his personal and representative characters in the same transaction and where his

official connection is an essential part of the corporate action.”

The facts herein can justify only one conclusion and that is that there was fraud and inequitable circumstances in the dealings of John Harrah and Gerety with Abbot Kinney Company to the advantage of the former and detriment of the latter.

VIII.

Brown Cannot Profit From Violation of the Fiduciary Obligation Owed by John Harrah and/or Gerety to Abbot Kinney Company.

Appellee concedes that at the time Brown obtained the assignment of the sprinkling system contract from Cruickshank & Co., he held no position of trust with Abbot Kinney Company. This, however, does not relieve Brown from liability to account to Abbot Kinney Company in the present matter, since he knew that John Harrah was a director and a member of the Executive Committee of Abbot Kinney Company [R. 235] and that Gerety was its manager and in full charge of its activities [R. 241] at the time the fraud upon Abbot Kinney Company was committed. This problem has been considered by the California Appellate Courts on many occasions. See *Smith v. Blodgett*, 187 Cal. 235 (201 Pac. 584); *Fink v. Weisman*, 129 Cal. App. 305 (18 Pac. (2d) 961); *Lomita Land & Water Co. v. Robinson*, 154 Cal. 35 (97 Pac. 10); *Victor Oil Co. v. Dunn*, 184 Cal. 226 (193 Pac. 243).

In *Smith v. Blodgett*, *supra*, the court said (p. 242):

“And where, after the violation of a fiduciary obligation, an accounting is had and an amount found to be due from the agent or trustee, judgment for

the same amount may also be rendered against those proven to have fraudulently aided in the attempt of the fiduciary to obtain secret profits, although they themselves are not fiduciaries and receive no share of the profits."

Also in *Lomita Land & Water Co. v. Robinson*, *supra*, the court said (p. 46):

"It is not essential to such a liability that such participant was originally a party to the contrivance of the fraud. If knowing the fraud contrived, he willfully aids in its execution, he thus becomes a party to the plan and is chargeable with the consequences. (See *Lincoln v. Chaffin*, 7 Wall. 138, (19 L. Ed. 106).) All persons uniting or cooperating in such a wrong are jointly liable for ensuing injury, irrespective of the degree of culpability. (See *Marrott v. Williams*, 152 Cal. 705, 93 (Pac.) 875, and cases cited therein; 3 Cooley on Torts, 213; *More v. Finger*, 128 Cal. 319 (60 Pac. 933).) As said by the learned Judge of the court below: 'It is not necessary that the defendants shall have all been in league from the beginning to defraud the investors, or any of them; they need not be *in pari delicto*. It is enough that each was at some time and in some degree a party to and aided the improper transaction and it matters not how unequal may have been the assistance rendered.' Nor is it even essential that such a participant should have shared at all in the profits of the fraud." (See also *Geddes v. Anaconda Copper*, 254 U. S. 590, 65 L. Ed. 425; *Jackson v. Smith*, 254 U. S. 586, 65 L. Ed. 418)

IX.

The District Court Did Not Err in Modifying the Findings of the Referee.

Appellants urge that “the court erred in modifying the Findings of the Referee and in finding that Abbot Kinney Company had the opportunity of acquiring said sprinkling system contract for the sum of \$10,000.” (Op. Br. p. 31.)

The District Court did not modify the Findings of the Referee to the effect that Abbot Kinney Company had the opportunity of acquiring the sprinkling system contract for the sum of \$10,000. [R. 67, Finding XIV, R. 71, Finding XXIV], but to the contrary confirmed, accepted and adopted the same as part of the court’s Findings of Fact. [R. 188.]

The District Court did, however, reject, reverse and modify Finding XXXII and Conclusions of Law V and VI and that portion of the Order respectively of Referee Brink, which provided that Brown was entitled to receive \$7500 of the \$30,000 on deposit and substituted therefor its own Finding, Conclusions of Law and portion of Order, which provided that Brown was entitled to receive only \$2500 of the \$30,000 on deposit. [R. 189, 190, 191, 192.]

The District Court not only had the right to do this but the duty and obligation so to do because the Referee’s Finding, Conclusions of Law and portion of Order in this respect was clearly error. According to Sec. 2a (10) of the Bankruptcy Act, the “records, findings and order” certified to the Judge by the Referee may be confirmed, modified, reversed or returned with instructions for further proceedings by the reviewing District Judge. Gen-

eral Bankruptcy Order No. 47 states that "The judge after hearing, may adopt the report or may modify it or may reject it in whole or in part."

In the matter of Sparta Canning Co. (C. C. A. 7th Circuit) 73 F. (2d) 732, 27 Am. B. R. (N. S.) 188, the court held that in view of the extremely broad power conferred by Sec. 2 a (10), the District Judge may amend and add to the Findings of the Referee. Under this broad grant of power, the reviewing judge is not barred from considering any issue presented by the record even though it was not discussed by or before the Referee. (See Collier on Bankruptcy, 14th Ed. Vol. II, page 1496, par. 39.28; also see *In re Wilde's Sons* (C. C. A. (2d) Cir.) 144 Fed. 972, 16 Am. B. R. 386; *Matter of Elmore Cotton Mills* (D. C., Ala), 217 Fed. 810, 33 Am. B. R. 544; *In re Clay* (C. C. A., 1st Cir.), 192 Fed. 830, 27 Am. B. R. 715; *In re Pettingill & Co.* (C. C. A., 1st Cir.) 137 Fed. 840, 14 Am. B. R. 757.)

The only limitation imposed on the scope of review by the District Judge is the statement in General Bankruptcy, 47, that "the Judge shall accept his (the Referee's) Findings of Fact unless clearly erroneous." In this instance, the Findings of Fact and Conclusions of Law rejected by the District Court were "clearly erroneous." The Referee made another Finding that the Abbot Kinney Company would have purchased the sprinkling system contract on June 6, 1944 for \$10,000 if it had not been prevented from doing so by the conspiracy instigated, conceived and executed by the Appellants herein and John Harrah, and that it would have been for the best interests of Abbot Kinney Company to have made such purchase. [R. 71, Finding XXIV.] From this, the Referee should have found that the maximum sum which

Brown could recover from Abbot Kinney Company was a total of \$10,000. Otherwise the Abbot Kinney Company would be penalized by the fraud of the conspirators. The District Court recognized this principal and corrected the error of the Referee. [R. 183-4.]

Conclusion.

Because Abbot Kinney Company, the alleged bankrupt, was in possession of the subject matter of this controversy at the time of the filing of the petition in bankruptcy, to wit: the \$30,000 and the sprinkling system, the District Court, as a court of bankruptcy, had exclusive jurisdiction to determine all controversial questions relative thereto. The evidence in this case is replete with fraud of the appellants herein and of John Harrah of the most flagrant nature and fully justifies and supports the District Court in making the order that appellants complain of in this appeal.

Appellee respectfully submits, therefore, that the order of the District Court should be affirmed.

Respectfully submitted,

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NICHOLAS & DAVIS,

By KYLE Z. GRAINGER and

M. PHILIP DAVIS,

Attorneys for Appellee.

APPENDIX.

Collier on Bankruptcy, 14th Ed., Vol. (2), General Orders in Bankruptcy, Rule 47,—REPORTS OF REFEREES AND SPECIAL MASTERS:

Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

Collier on Bankruptcy, 14th Ed., Vol. (1), Chapter II, Section Two: U. S. C. Ann. Title 11, Chap. 2, Sec. 11.

a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

(1) Adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged

bankrupts by courts of competent jurisdiction without the United States, and have property within their jurisdiction;

(7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate, whenever under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest;

(10) Consider records, findings, and orders certified to the judges by referees, and confirm, modify, or reverse such findings and orders, or return such records with instructions for further proceedings:

b. Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated. As amended May 27, 1926, c. 406, Sec. 2, 44 Stat. 662; June 22, 1938, c. 575, sec. 1, 52 Stat. 842.

UNITED STATES CODE ANNOTATED—Title 28—page 401
RULE 8, GENERAL RULES OF PLEADING.

(a) CLAIMS FOR RELIEF. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to

support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

California Civil Code, Section 3450.

“INSOLVENT” DEFINED.—A debtor is insolvent, within the meaning of this title, when he is unable to pay his debts from his own means, as they become due. Leg. H. 1872.

California Civil Code, Section 1796 (3).

Definitions (3) A person is insolvent within the meaning of this act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not.



No. 11397.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

In the Matter of

ABBOT KINNEY COMPANY,

Alleged Bankrupt.

E. A. GERETY, WILLIAM HARRAH, CHARLES BROWN and
HAROLD POOL,

Appellants,

vs.

ABBOT KINNEY COMPANY,

Appellee.

APPELLANTS' REPLY BRIEF.

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Appellee.

APPELLANTS' REPLY BRIEF.

Statement Re Questions and Points Involved in
Appellants' Opening Brief (pp. 2-3).

Appellants, in their Opening Brief, in addition to other questions, asked these jurisdictional questions:

1. Can three bond holders, whose claims are *secured* and who do *not waive their security*, file an involuntary petition in bankruptcy?
2. Where three such bond holders file a *defective* involuntary petition in bankruptcy, can the alleged bankrupt institute proceedings (Order to Show Cause) *prior to adjudication* to determine the validity of a conditional sales contract and to establish a trust in respect thereto over objection to jurisdiction by the holder of the contract?

3. Where, in connection with such petition, there is a stipulation of the parties to first determine the questions whether the petition is *sufficient and whether the alleged bankrupt is bankrupt* and the stipulation is approved by the Court, can the Court or any of the parties *repudiate the stipulation* over the objection of the other parties and proceed to try *title matters prior to the determination of said questions and prior to adjudication?*
4. Can the decision in an Order to Show Cause Proceeding, instituted under a *defective involuntary petition, prior to adjudication*, stand after the involuntary petition is dismissed?
5. On page 9 of Appellants' Brief the following *jurisdictional points* were stated:
 1. The District Court had *no jurisdiction* to entertain the Summary Proceedings resulting in the Order appealed from.
 2. *No persons qualified* to file an involuntary proceeding signed or joined in the involuntary petition.
 3. The involuntary petition *does not state an act of bankruptcy*.
 4. The alleged bankrupt cannot institute proceedings to recover a preference and to *quiet title and to establish a trust* against an adverse claimant *prior to adjudication*.
 5. Where the parties stipulated to a procedure to be followed and the Referee approved that stipulation, it is error to permit a repudiation of the stipulation.

6. Where involuntary petition was dismissed, it was error not to dismiss summary proceedings instituted by the alleged bankrupt.

Appellee in its reply avoid directly answering those questions and those points, and the authorities in support thereof, and with the exception of one case cited by Appellants *re* jurisdiction, Appellee does not comment one way or the other upon the numerous authorities referred to in Appellants' Brief and it is our contention that those authorities are controlling. These questions will be discussed *infra*.

Reply to Appellee's Statement of Facts.

With reference to the facts, Appellee says that Appellants' statement of facts are inadequate and incomplete and then proceeds to restate the facts by adding thereto and interpolating therein its own conclusions and various matters of argument. Furthermore, Appellee's statement of facts, commencing on page 2 of its Brief and extending to page 19 thereof, contains many inaccurate and misleading statements. On the contrary, the statement of facts set forth in Appellant's Brief was limited to a brief and concise statement of the material facts involved in this case and Appellants contend that the material facts are as set forth in Appellants' Opening Brief.

In view of our belief that we have set forth a fair statement of the material facts in our opening brief, we shall not take up in detail all of the various alleged statements of fact contained in the Appellee's Brief, but will limit our remarks in this respect to some of the inaccurate and misleading statements made by the Appellee and to some of their conclusions and argumentative matters contained under their heading "Statement of Case."

For instance, the first sentence of the second paragraph on page 4 of Appellee's Brief is not sustained by page 521 of the record as therein indicated. In that respect, it should be observed also that if that alleged statement were true, the directors, other than John Harrah and Carleton Kinney, would undoubtedly have immediately arranged a directors meeting and removed the Executive Committee.

The statement at the bottom of page 4 of Appellee's Brief to the effect that John Harrah and Carleton Kinney refused to attend a meeting so that a quorum would not be present, is not accurate. The record shows, on the contrary, that they didn't attend a meeting at the time because it was their desire to have a full board present.

The statements on page 5 of Appellee's Brief that the Cruickshank Company had renewed the \$10,000.00 offer in 1944 is not correct. M. Philip Davis and his associates had been trying to buy the contract and, in the year 1943, had an option to buy it, but did not disclose that fact or bring the same to the attention of the Abbot Kinney Company until the very day the option was expiring. [R. 312, 321, 497.] Appellants pointed out in their Opening Brief, and here repeat, that from the testimony of Hugh Darling, Appellee's own witness, who was in a position to know, it appears that there was no offer by the Cruickshank Company in 1944 to sell the contract to anyone for \$10,000.00 and that that company never at any time offered to sell the contract to the Abbot Kinney Company for \$10,000.00.

Page 325 of the record does not sustain the statement that John Harrah again rejected the offer of Cruickshank Company to sell the contract for \$10,000.00. It does not appear on page 325, however, that John Harrah then ad-

vised Brown and Gerety not to buy the contract. [R. 325.]

The references on page 5 of Appellee's Brief to a *renewed offer* to sell a contract to Abbot Kinney Company for \$10,000.00 are misleading. There was no such thing at that time. In fact, the Cruickshank Company never offered it to the Abbot Kinney Company for that price, although in 1943 M. Philip Davis had an option to buy it at that price. According to Mr. Newton, he had told John Harrah at one time that it could be bought for \$10,000.00, but at that time the company did not have the money. [R. 312, 323.]

The statements near the top of page 10 of Appellee's Brief to the effect that Gerety had general unlimited powers is not sustained by the record. On the contrary, Gerety's powers and duties were of a *limited character*. He was *manager in name only*. [R. 433-446, incl.]

The statement that Brown co-mingled William Harrah's supplies with his own is an inaccurate statement. Mr. Brown did buy some merchandise for Mr. Harrah, and Mr. Brown, as was customary among the various operators on the pier, did buy or borrow merchandise from, and sell or lend merchandise to, the other operators on the pier, including Mr. William Harrah. [R. 216 and 217.]

The statement at the top of page 13 of Appellee's Brief to the effect that Gerety was in full charge of the Abbot Kinney Company's affairs is based upon the conclusion of one witness and is contrary to the facts in that respect, as set forth in the record.

The matters contained in the last paragraph on page 13 of Appellee's Brief and most of the matters set forth on page 14 thereof, are not statements of fact, but statements of Appellee's theories and argument to justify the

improper use of bankruptcy jurisdiction to try title to personal property. In substance Appellee states there that Abbot Kinney Company was *either insolvent or not insolvent*, depending upon whether the sprinkler contract and the \$30,000.00 paid on it belonged to the Abbot Kinney Company. Appellee argues, therefore, to determine that question a petition in involuntary bankruptcy was filed alleging that Abbot Kinney Company was insolvent so that Appellee could try title to the sprinkler contract and the \$30,000.00 *to find out whether or not the company was insolvent.* Then if it was determined that the sprinkler contract and the \$30,000.00 belonged to the Abbot Kinney Company, the result would be that that company was *not insolvent and not bankrupt and that it did not belong before the Bankruptcy Court.* Yet Appellee's want the decision respecting the title to that property, which was determined under an order to show cause, to stand *even though the bankruptcy petition is found invalid and is dismissed.*

Appellants contend that Appellee's aforesaid argument supports our position that there was no jurisdiction to entertain such proceedings. Furthermore, we say that the matters contained in the foregoing paragraph are argumentative and are not properly included in a statement of facts.

There are numerous other conclusions and argumentative matters contained in the alleged statement of facts set forth in the Appellee's Brief, but we believe the foregoing are sufficient to illustrate our position in that regard. Suffice it to say that the statement of facts contained in Appellants' Opening Brief is, in our opinion, an accurate and complete statement of the material facts involved in this proceeding.

Reply to Appellee's Argument re Jurisdiction.

Appellants insist that the three *secured* bondholders, who did *not waive their security*, were not qualified to file such petition. That is shown on the face of the petition. Furthermore, the petition does not show an Act of Bankruptcy. The Bankruptcy Court never acquired jurisdiction and Appellants consistently and constantly objected to the proceedings because the Court had no jurisdiction to entertain the same. Appellee, contrary to the solemn and binding stipulation of the parties, approved by the Court, disregarded and repudiated that stipulation and caused *title to personal property to be tried prior to adjudication* under a defective petition which was subsequently dismissed. Appellants contend there was no jurisdiction to support such proceedings and that the same should not be tolerated.

In an effort to get around the lack of jurisdiction, Appellee contends that the amended involuntary petition invoked the jurisdiction of the Court simply because, according to them, it contains an allegation "that Abbot Kinney Company was insolvent" and an allegation "that each of the three petitioning creditors had a provable general unsecured claim against the corporation, fixed as to liability and liquidated in amount, which in the aggregate amounted to more than \$500.00 over and above the value of securities held by them." (App. Br. p. 20.) If the involuntary petition had stopped at that point, their position might have some merit, but then the question would probably have been disposed of by an indictment for perjury. However, Appellee's petition did not stop there. It contained further allegations. The petitioning creditors proceeded to state the nature and amount of their

claims. [See R. 6, par. 5.] The petition alleged the giving of a trust indenture and the amount of the outstanding bonds, the value of assets, that the petitioners were bondholders, and that they "*do not waive the security for said bonds.*" The first above mentioned allegations are naked *conclusions* of the pleader. *The ultimate facts are alleged in paragraph 5*, and it is clear from the petition that the outstanding bonds amount to \$269,000.00 which are *secured* by property of the value of \$400,000.00, and that the bonds bear interest at the rate of 7% per annum (which would amount to \$18,830.00 per year), and that there is due in interest upon said bonds \$225,000.00. This interest obligation is not alleged to be owing, but merely due, under Section 336a, C. C. P. (App. Op. Br. p. 3.) The statute of limitations would be the period of six years. It is clear, therefore, that we have petitioning creditors whose claims *were secured* by security equaling the value of the outstanding bonds. How then can it be said that these claims were *fixed as to liability and liquidated in amount* as required by Section 59b of the Bankruptcy Act? We again repeat that the *petition on its face was defective and showed want of jurisdiction.*

Appellee argues, however, that regardless of the defects of the involuntary petition, the lower court acquired jurisdiction by the filing of the defective petition and the service of a subpoena and that no person other than the alleged bankrupt could suggest to the lower court its jurisdiction had been improperly invoked and that it was proceeding contrary to law. (App. Br. p. 27.) How could the Court acquire *jurisdiction* under a petition which showed *want of jurisdiction on its face*?

Appellee's said argument, in an effort to show jurisdiction, is best answered by the case of *Taft v. Century Savings*, 141 Fed. 369, 15 A. B. R. 597, and the Supreme Court cases quoted from therein. The Court there said:

"The District Court, as a court of bankruptcy, is undoubtedly a court of *limited jurisdiction*. Congress alone had power to determine the subjects over which it might exercise jurisdiction. As said by the Supreme court in *Johnson Company v. Wharton*, 152 U. S. 252, 260, 38 L. ed. 429, 433, 14 Sup. Ct. Rep. 608:

'The distribution of the judicial power of the United States among the courts of the United States is a matter entirely within the control of the legislative branch of the government.'

It is suggested that the bankruptcy court had jurisdiction over the alleged bankrupt in this case by due service of the subpoena upon him, and over the subject matter by virtue of the Bankruptcy Act which confers upon it plenary jurisdiction in bankruptcy proceedings. But this does not solve the question. It was said by the Supreme Court in *Windsor v. McVeigh*, 93 U. S. 274, 282, 23 L. ed. 914, 917, that: 'All courts, even the highest, are more or less limited in their jurisdiction. They are limited to particular classes of actions. . . . Though the court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. . . . The judgments mentioned . . . (in the case referred to for illustration) would not be

merely erroneous. They would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases.'

To the same effect are the following cases:

Ex parte Lange, 18 Wall. 163, 176, 21 L. ed. 872, 878; *Cornett v. Williams*, 20 Wall. 226, 250, 22 L. ed. 254, 259. In the last-cited case, it is said:

'The settled rule of law is that, jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud.'

Applying the foregoing principles to the statute under consideration, it appears that Congress limited the jurisdiction of the District Court as a court of bankruptcy to cases in which the debtor owes at least \$1,000. Cases in which the debtor owes less than that sum are not brought 'within the power' of its jurisdiction, and debtors owing less than that sum are not subject to the provisions of the Bankruptcy Act. It has been held by the Circuit Court of Appeals for the Seventh Circuit that a petition in involuntary bankruptcy must show clearly that the debtor is not a wage earner or engaged chiefly in farming or the tillage of the soil. *In re Taylor*, 4 A. B. R. 515, 102 Fed. 728, 2 N. B. N. Rep. 929. To the same effect is the decision of this court in *In re Plymouth Cordage Company*, 13 A. B. R. 665, 135 Fed. 1000, and the decision of the Circuit Court of Appeals of the Fifth Circuit in *Beach v. Macon Grocery Company*, 9 A. B. R. 762, 120 Fed. 736. We observe no difference in principle between the omission of an averment bringing the debtor without the exception as to wage earners or persons engaged

chiefly in farming or the tillage of the soil and the omission of an averment bringing the debtor within the class which owes debts to the amount of \$1,000 or over. *These provisions are both, in our opinion, jurisdictional*, and either of the omissions just mentioned shows that the debtor proceeded against is not within the class of persons subject to the provisions of the Bankruptcy Act, or subject to the jurisdiction of the court in bankruptcy. *The petition in this case was therefore defective* in not disclosing that the debtor owed at least \$1,000, *and for that reason it conferred no jurisdiction* upon the court to subject Cohen, the debtor, to the provisions of the Act.” (Italics ours.)

To confer jurisdiction Section 59-b of the Bankruptcy Act requires *three creditors “who have provable claims fixed as to liability and liquidated as to amount.”* This is as essential as the provisions of Section 4 requiring debts of \$1,000 or more. (Italics ours.)

Appellee cites the case of *In re S. W. Straus & Co., Inc.*, 67 F. (2d) 605, where the parties raising the defect were estopped to do so by their conduct in filing an answer and going to trial. In the case at bar *the defective petition and the lack of jurisdiction of the lower court were urged at the commencement of, and throughout, the proceedings.* [See R. 42, 43, 145, 202; also R. 145 to 148.] Appellee next cites *In re Hudson Coal Co., Debtor*, 22 Fed. Supp. 768. The case arose under 77-b which permitted the court to affect the security of bondholders, which made the bondholders parties in interest and permitted them to intervene to be heard in connection with their affected rights. It certainly does not permit bondholders to institute proceedings on their behalf without

the trustee and other bondholders by parties thereto contrary to a specific provision of the trust indenture. [R. 585, Op. Br. p. 13.] For a discussion of the history and objects of 77-b, see *Chicago Title & Trust Co. v. Wilcox Building Corporation*, 302 U. S. 120, 82 L. Ed. 147.

Appellee next cites *In re Plymouth Cordage Co.*, 135 Fed. 1000, and *In re First National Bank of Belle Fourche*, 152 Fed. 64. Remington, Vol. 1, p. 72, in discussing the last case, points out the correct rule:

“The argument of these last two cases is that such facts pertain, not to the subject matter, but simply to the cause of action. However, it would seem that did they pertain simply to the cause of action their nonexistence would be waivable; but, assuredly, neither consent nor waiver can confer jurisdiction in the bankruptcy court of one district to adjudge bankrupt a debtor not resident domiciled nor having his principal place of business therein, although the ascertainment of such jurisdictional fact must be left to the same court for determination and its determination may not be subject to collateral attack. Nor would any attempt to administer in bankruptcy a banking corporation or other corporation not included within the designated classes subject to bankruptcy be otherwise than null and void. Such ruling is familiar in probate jurisprudence upon the subject of attempts to administer upon the estate of a decedent who was not a resident at the time of his death or otherwise within the statutory classification.

“The ruling that the *fact* of occupation is not jurisdictional is purely obiter in each of these cases; and the ruling that the *allegation* of occupation also is not jurisdictional, evidently has reference to the unimpeachability of the record by collateral attack

where the record does not *affirmatively* show the debtor does *not* belong to the particular class but simply omits all allegations whatsoever as to the occupation. As is later noted (§§511, 535), the record of adjudication imports jurisdiction where jurisdictional findings are merely omitted and makes the adjudication impervious to collateral attack, but if the record of adjudication affirmatively shows the debtor did *not* belong to one of the classes subject to bankruptcy it would without question be absolutely void on its face. Section 2 of the Act grants 'jurisdiction' to adjudge bankrupt debtors who have resided or had their domicile or place of business within the district a certain specified time. Such residence, domiciliation, etc., are, therefore, declared to be jurisdictional. Of the same nature are the limitations regarding occupation and amount of debts; they are limitations upon or extensions of the general subject matter of 'bankruptcies'."

It is clear from the above authorities, as well as those set forth in Appellants' Opening Brief, that a Bankruptcy Court is one of *limited jurisdiction* and that one must bring himself within the statute to confer jurisdiction; also that if there is no jurisdiction the proceedings are *absolutely void*. It is just as essential that there be three qualified unsecured creditors in an involuntary petition as it is to have a resident debtor as prescribed by the Act. In the case at bar the petition shows on its face that the petitioning creditors were *not qualified* and that no Act of Bankruptcy had been committed. This petition was later dismissed and there *never was any adjudication*. Appellants maintain that on the facts and under the law there was *no jurisdiction* and all of the proceedings including the order appealed from were and are *void*.

Reply to Appellee's Argument Re Propriety of Summary Proceedings.

Appellee's argument on the above point, commencing on page 28 of its Brief, is based upon the premise that the Bankruptcy Court had possession of all of the property of the alleged bankrupt and could determine all of the issues involved in these proceedings. Appellee relies upon the case of *Murphy v. Hoffman*, 211 U. S. 562. We pause to ask this Honorable Court to observe that the Bankruptcy Court in that case was in the *actual possession* of the property which was subject to the litigation. The Court said: "Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts." The same situation existed in *Isaacs v. Hobbs*. The same principle is announced in the next case cited by Appellee, *In re Baldwin*, 291 U. S. 610, except that there is added the feature that title passes to the trustee as of the date of the filing of the petition. This passing of title from the bankrupt to the Court occurs upon an adjudication but relates back to the filing of the petition. (See Section 7-2 11 U. S. C. A. 110; *Johnson v. Collier*, 222 U. S. 538, at 539 and 540; *Taylor v. Sternberger*, 293 U. S. 470, 79 L. Ed. 599, 55 S. Ct. 260.)

No receiver was appointed upon the filing of the involuntary petition in case at bar and the ABBOT KINNEY COMPANY came to Court, and was at all times, still in possession of the sprinkler system. [See Petition for Order to Show Cause, R. 17, par. 2; R. 23, pars. 1, 2 and 3.] Furthermore, that company ever since has been and

still is in possession of the sprinkler system, free of any bankruptcy proceeding.

A reply to Paragraph 3 further enlarges upon this question of jurisdiction and passing of title. We think the right to protect property that may come into the possession of the Bankruptcy Court by *injunction* is clearly distinguishable from directing a proceeding against an adverse claimant where *no statutory jurisdiction is conferred* upon the District Court *prior to the adjudication* and the appointment of a trustee.

Appellants contend that there is no merit in Appellee's argument on the foregoing point. In this case, we had a *defective* involuntary petition. The three alleged creditors who signed the same were not unsecured creditors and were not qualified petitioners, but on the contrary, they were, as shown on the face of the petition, *secured creditors*. There never was any adjudication. The defective involuntary petition was subsequently dismissed. There was nothing in the possession of the Court which could be construed in any sense to confer jurisdiction under the circumstances. It is true that the parties had deposited the money with the clerk but that was done *conditionally* under the terms of the above mentioned stipulation and under any arrangement whereby the parties agreed to first determine whether or not this matter had any business being in the Bankruptcy Court. In other words, to first determine whether or not the involuntary petition was sufficient and whether the ABBOT KINNEY COMPANY could be adjudicated bankrupt. It was further the understanding of the parties in good faith that the money would be refunded to the depositors pursuant to the stipulation if there was no adjudication.

Reply to Appellee's Argument That the Alleged Bankrupt Could Institute These Proceedings.

In considering this question it is important to define the property rights in respect to the subject matter of the proceedings had in the lower Court and have clearly in mind *where title was vested*. It is further necessary that an action be prosecuted by the real party in interest *in a Court that has the statutory jurisdiction* to entertain the proceeding in accordance with the procedure required by statute.

What is the situation in the case at bar? At the time of the filing of an involuntary petition the alleged cause of action against the Appellants herein was vested in the ABBOT KINNEY COMPANY. That company would have had to commence an action in the *State Court* in order to obtain the relief sought by the Petition for Order to Show Cause. [R. 17.] The passing of the title to that cause of action *would not change until an order of adjudication has been entered and a trustee in bankruptcy appointed*. *Taylor v. Sternberger*, 293 U. S. 470, 55 S. Ct. 260; Section 70(a) of the Bankruptcy Act, 11 U. S. C. A. 110:

“The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy.”

As pointed out in Remington, Vol. 3, Sec. 1187, it is important to distinguish whether the title comes to the

trustee from the bankrupt under clause 3 of Sec. 70 or from creditors under clauses 4 and 5 of said section.

“Rights of creditors which may be enforced by the trustee by virtue of § 70(e), 11 U. S. C. A. §110(e), must be distinguished from those which he derives from the bankrupt by virtue of clause (3). The latter rights can only be enforced in courts in which the bankrupt could have enforced them. This follows from the limitations contained in §23, 11 U. S. C. A. §46. In Massachusetts, the rights of a husband in the property of his wife do not pass to a trustee in bankruptcy. The right is certainly not a power within the meaning of clause (3). The power of a licensee to assign his license has been regarded as within clause (3). The right of a corporation to void contracts entered into by directors who are acting in breach of their fiduciary responsibility passes to the trustee by virtue of clause (3). Clause (3) was applied where a managing agent of a corporation, having power to borrow, but no power to mortgage assets of his principal to secure moneys borrowed, gave a mortgage for that purpose, and thereafter the corporation was adjudicated. It was held that the right which the bankrupt corporation might have exercised for its own benefit to repudiate the mortgage could be exercised by its trustee. The trustee, in the right of the bankrupt, under clause (3), may recover assets diverted by a director of the bankrupt corporation who has taken advantage of his fiduciary position.”

(See Remington, Vol. 3, 1206.01, p. 81):

“The right of a corporation, and therefore of its trustee, to recover from officers and directors for breach of their fiduciary duty may arise at common law and not by reason of any express provision of

the corporation statutes, and it passes to the trustee. The trustee, in seeking to recover from directors for fraud and mismanagement, must establish something more than mere neglect. Where a trustee seeks to recover funds wrongfully diverted by directors prior to bankruptcy, he must show that there were creditors existing at the time of the wrongful withdrawal."

The Supreme Court has considered this question in *Kelley v. Gill*, 245 U. S. 116, 62 L. Ed. 185, 38 S. Ct. 38:

"The question presented is of importance in the administration of bankrupt corporations. To enable the trustee, by means of a single suit in the court of bankruptcy, to determine and enforce payment of all amounts due from stockholders, would obviously promote the effective administration of the bankrupt estate; but the aggregate burden thereby cast upon the individual stockholders might be correspondingly heavy. Whether the right to choose the court and the place in which litigation shall proceed should be conferred upon the trustee or upon the defendant is a legislative question with which Congress has dealt in the Bankruptcy Act (1898, chap. 541, 30 Stat. at L. 544). Section 2, clause 7, confers upon the court of bankruptcy jurisdiction to 'cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto except as herein otherwise provided.' But § 23-b prohibits the trustee (with exceptions not here applicable) from prosecuting, without the consent of the proposed defendant, a suit in a court other than that in which the bankrupt might have brought it, had bankruptcy not intervened. The corporation is a citizen of California. It could not have sued these stockholders except in the state courts. The

court of bankruptcy was, therefore, without jurisdiction of this suit unless there is something either in the nature of the cause of action, or in the relation of stockholders to a corporation, or in the character of the suit, which prevents the application of the prohibition contained in § 23-b.

“But even if there had been equity jurisdiction, the suit could not have been brought in the Federal court. The cause of action sued on would still have been the broken promise of the individual stockholder to pay the balance on his stock. That was a cause of action on which the bankrupt could have sued and sued only in the state court. The cause of action would remain the same, although equity, to avoid multiplicity of actions at law, undertook to deal with three thousand separate claims in a single suit. The mere fact that the bankrupt could not have brought the particular suit would not confer on the court of bankruptcy jurisdiction of the suit of the trustee. *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 S. Ct. 1000, 4 A. B. R. 163.”

Section 23-b of the Bankruptcy Act, quoted on page 19 of our Opening Brief, *prevented the alleged bankrupt from litigating this in the bankruptcy court*. Counsel's contention that the filing of the petition withdrew the jurisdiction of all other courts is contrary to said Section 23-b, and his cases in argument in this connection are wholly inconsistent with his argument under his Point 2. We do not contend, as stated by counsel (App. Br. p. 32), for a rule denying the bankrupt the right to litigate over assets prior to an adjudication, but for a rule that *such litigation must be in the court and forum where the bankrupt would have had to litigate the question if an involuntary petition had not been filed*. (See Collier on Bankruptcy, 14th Edition, Vol. 1, p. 1176.)

Answer to Appellee's Argument re Rights of Creditor to Intervene.

Appellee argues that in 1938 an amendment to the Chandler Act with respect to Section 18-b deprived creditors of the right to move to dismiss an involuntary petition defective in form and imposing upon the jurisdiction of the District Court. This objection on behalf of creditors is to be distinguished from the procedure of answering and participating in a trial of the issues which are to be determined on evidentiary matters. In fact it is the *duty of the court to raise the question* of lack of jurisdiction where the parties fail so to do. The authorities are collected in the case of *In re Pacific States Savings & Loan*, 27 Fed. Supp. 1009, at 1012. Remington states the rule in Volume 1, Sec. 35, p. 71: "Thus, the question may be raised by creditors or others, even though the bankrupt waives, consents or absconds." (See *In re New York Tunnel Co.*, 166 Fed. 284, 21 A. B. R. 531):

"Although we think these objections are good, still if the appellants and petitioners have called our attention to a *jurisdictional defect* which makes the adjudication a nullity, we feel bound to consider it. *If a petition for adjudication were made by only two creditors, the law requiring three, there would be a jurisdictional defect on the face of the record, making any adjudication void.* On the other hand, if the aggregate amount of claims were stated to be \$500 as required by law, and because of set offs or other reasons was in point of fact less, an adjudication would be an error to be corrected by appeal. So if the petition were against a railroad company there would be on the fact of the record such a jurisdictional defect as would make an adjudication

void. Whereas, if the corporation might or might not be considered within the act an adjudication, even if erroneous, would have to be corrected by appeal.” (Italics ours.)

Answer to Appellee’s Argument re Repudiation of Stipulation.

We think the stipulation itself is the best reply to Appellee’s argument with reference to the above point for the reason that the stipulation was approved by the Court and provided for an *immediate determination of the involuntary proceeding*, and when the same was determined, the party to whom said funds should be paid. It is the disregard of that stipulation by the Court and the parties and the attempt to proceed under the cases cited in Appellee’s Brief that constitute the repudiation and the substitution of litigation in the place of an approved agreement.

The specific intent and purpose of the stipulated arrangement was to *hold everything in abeyance* until it was decided whether or not any of these matters belonged in the Bankruptcy Court. The idea was that it should first be determined whether the petition was of any effect and whether there could be an adjudication. Furthermore, the specific intent and purpose was to do nothing until, if and after there had been an *adjudication*. Appellants contend that the course taken by Appellee is not only contrary to the stipulation and its specific intent and purpose, but that the same amounts to an imposition on the Bankruptcy Court. We contend that there was no justification for Appellee’s conduct in that regard and that there was no jurisdiction on the part of the Court to tolerate those proceedings.

Answer to Appellee's Argument re Effect on Proceedings by Dismissal.

Appellee's argument with reference to this point is based upon the District Judge's decision which, in turn, cites *Isaacs v. Hobbs*, 282 U. S. 734. This argument is predicated upon the unsound premise that title to the bankrupt's assets passed to the Bankruptcy Court. As we have heretofore pointed out in reply to Appellee's Point 3, *title does not pass until there has been an adjudication and the appointment and qualification of a trustee*. This is clearly laid down by the Supreme Court in *Johnson v. Collier*, 222 U. S. 538, at 540, where the rule is stated as follows:

"While for many purposes the filing of the petition operates in the nature of an attachment upon choses in action and other property of the bankrupt, yet his title is not thereby divested. *He is still the owner, though holding in trust until the appointment and qualification of the trustee, who thereupon becomes 'vested by operation of law with the title of the bankrupt' as of the date of adjudication.*

"Until such election the bankrupt has title-defeasible, but sufficient to authorize the institution and maintenance of a suit on any cause of action otherwise possessed by him. It is to the interest of all concerned that this should be so. There must always some time elapse between the filing of the petition and the meeting of the creditors. During that period it may frequently be important that action should be commenced, attachments and garnishments issued, and proceedings taken to recover what would be lost if it were necessary to wait until the trustee was elected." (*Italics ours.*)

If an injunction had been issued by the Bankruptcy Court when the proceedings were dismissed, the effect of the injunction would likewise fall as the same is ancillary to the main action itself.

The United States Supreme Court has definitely stated the rule that is applicable in such matters. In *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 32 Supreme Court R. 96, 100, that Court said:

“It was the duty of the bankruptcy court, if it intended to administer the property under the bankruptcy law, to *promptly determine the question of adjudication*, to proceed with the selection of a trustee the administration and distribution of the estate, as required by the act. This it evidently declined to do, and permitted the creditors’ committee, which had been organized for the avowed purpose of defeating court proceedings, to administer the estate, to buy and sell property, and mature a plan for the reorganization of the concern. This may have been for the benefit of the creditors, but it was not the administration of the law as laid down in the bankruptcy act. *It is not within the province of the bankruptcy court to deny an adjudication in bankruptcy, and then hold jurisdiction over the property for the purpose of allowing some of the creditors to effect a reorganization and distribution of the property.*”

We cannot say that the supreme court of Missouri was wrong; indeed, we think it was right in reaching the conclusion that the district court had declined to adjudicate the corporation a bankrupt and vest its property in a trustee, and, deeming it best for the creditors to follow out their plans, had found that the case was not one calling for the in-

tervention of the bankruptcy court. Indeed, there is nothing in the record to contradict the statement of the circular in evidence in the court below, that the court had found the corporation solvent. *With the question of adjudication determined against the right to proceed in bankruptcy, the jurisdiction of the district court ended, and the property became subject to the ordinary methods of procedure in courts of competent jurisdiction.*" (Italics ours.)

Appellants contend that the petition was defective on its face; that the alleged petitioning creditors were not qualified to file the same, and that it was certain that the involuntary petition would ultimately be dismissed. Appellants contend that there was no jurisdiction under the circumstances to try the matters resulting in the order appealed from. Appellants further contend that the dismissal of the involuntary petition should and did have the effect of eliminating everything that was done under the defective involuntary petition.

Reply to Appellee's Argument re Fiduciary Relationship.

In paragraphs VII and VIII of Appellee's Brief (pp. 43-59) Appellee, without answering the facts or law as set forth in Appellants' Brief, attempts to show a conspiracy existed between JOHN HARRAH, GERETY and BROWN and after arriving at such a conclusion, cite cases relative to conspiracy with which Appellants have no quarrel, provided that law is read in the light of the facts to which it is applicable.

Nowhere in the evidence is there any showing that BROWN was an undisclosed agent for JOHN and WILLIAM

HARRAH in connection with the purchase of the sprinkler contract. The facts merely show that BROWN and GERETY purchased the contract and that thereafter WILLIAM HARRAH acquired an interest in the contract. The argument on page 45 of the Appellee's Brief that JOHN HARRAH was the motivating force behind the purchase of the contract is not sustained by the record. Furthermore, fair consideration of the matter precludes that conclusion because if JOHN HARRAH had desired to buy the contract, he certainly would not have allowed BROWN and GERETY to purchase the same, nor would he have permitted Brown's interest to be purchased with his (JOHN HARRAH'S) money, and GERETY'S interest with his (GERETY'S) money. The authorities cited by Appellee on pages 46 and 47 of their Brief are the law in California relative to proving conspiracy, but Appellee has failed to show (1) That Gerety had any fiduciary relationship as the same is defined by law; (2) that Gerety violated any fiduciary relationship. In spite of the conclusions reached by the Appellee, there has been no showing in this case that either of the Harrahs acquired any interest in the sprinkler contract until after the purchase of the same. There is an attempt by Appellee to show a violation of some fiduciary relationship on the part of Gerety based on the conversation supposedly held with Al Newton on June 6, 1944. However, Appellee's own case refutes the possibility of any such conversation. Newton's recollection of the conversation which occurred according to him on a specific date, is refuted by Gerety's testimony. It is rather peculiar that Newton did recall this one conversation when he was so vague and indefinite about meetings held by the executive committee. However, disregarding Newton's testimony relative to this

conversation and Gerety's testimony contradicting this testimony, Appellee has shown that such a conversation could not have occurred under the testimony of their own witness Hugh Darling. It is undisputed that DARLING had been a director of the corporation and was the representative of the Cruickshank Company and was the person with whom all negotiations were made concerning the purchase of the sprinkler contract. Darling's testimony is that there was no offer ever made to the Abbot Kinney Company on or about June 6, 1944, to sell the sprinkler contract for \$10,000.00 or for any other sum [R. 399]. Darling testified that from about 1937 to 1944 he brought up the matter of the Abbot Kinney Company making payments on the contract [R. 386]. The contract was never offered at that time to the Abbot Kinney Company by the Cruickshank Company [R. 402]. He did offer the sprinkler contract in 1943 to the Davises for \$10,000.00. The contract had been offered to Williams, Halper and Phillips at prices ranging from \$25,000 to \$50,000 [R. 392]. From 1943 down to the date of the purchase of the contract, the only time \$10,000.00 was ever mentioned was when Gerety offered \$10,000.00 for the contract in June, 1944. This offer, a subsequent offer of \$12,500.00 and an offer of \$15,000.00 was made by Gerety and Brown and the only price ever mentioned in 1944 other than the above offers, was the price of \$15,000.00 which was finally paid by Gerety and Brown [R. 399].

Appellants firmly believe that Newton's testimony relative to anything that occurred in June, 1944, with reference to the above subject was just a figment of Newton's imagination. That was very apparent from his indefiniteness under cross-examination.

On page 54 of Appellee's Brief, the contention is made that Gerety participated in and was part of the conspiracy. There being no showing (1) that the Harrahs were interested in the sprinkler contract at that time, or (2) that Brown and Gerety had any fiduciary relationship to the Abbot Kinney Company at that time, their negotiations for the purchase of the contract could not be a part of any conspiracy. On page 55 of Appellee's Brief, cases are cited relative to officers and directors acquiring claims against an insolvent corporation. The answer to these contentions is that there was *no showing that the corporation was insolvent* and there has been *no attempt on the part of the Appellee to show that Gerety was an officer* of the corporation within the purview of the cases cited by Appellee. In fact, Appellee has failed to comment on any of the cases cited by Appellants showing Gerety was not an officer of the corporation. As admitted by Appellants, John Harrah, because of the fact that he was an officer of the corporation, held a fiduciary relationship with the corporation and the cases cited on page 55 of Appellee's Brief would be applicable to John Harrah as a director of the corporation, but it is to be noted that these cases, as stated in Appellants' Opening Brief, applied to directors and officers of the corporation and *not to a person in Gerety's position*.

There is no need to further comment on the position of Gerety and his duties. His relation to the corporation is fully set forth commencing on page 35 of Appellants' Opening Brief.

On page 58 of the Appellee's Brief, the statement is made that Brown cannot profit from violation of the fiduciary obligation owed by John Harrah or Gerety and

cases supporting such statement are cited by Appellee. The law in the cases cited by Appellee is good, but before these cases would be applicable to the instant case, it would have to shown first, that Gerety at the time of the purchase of the contract owed a fiduciary relationship to the Abbot Kinney Company and, second, that John Harrah was at that time one of the so-called conspirators who were attempting to acquire the contract. The facts do not warrant the conclusions upon which Appellee bases its arguments.

Reply to Appellee's Argument re Court's Right to Modify Findings.

In answer to Appellee's Point No. IX, in which it is stated the court did not err in modifying the findings of the referee, the statement is made that the court had the right to hold that the Abbot Kinney Company could, on June 6, 1944, have purchased the contract for \$10,000.00. All that need be stated on this point is that the testimony of the witness, Hugh Darling, produced by Appellee, is that there was *no offer in the year 1944 to sell the contract to anyone* (he also testified he never offered the contract to the Abbot Kinney Company in 1944) *for \$10,000.00* and that although negotiations had been conducted with a concessionaire by the name of Phillips and with Halper, who offered \$12,500.00 for the contract, the only offer ever made for the purchase of the contract that was accepted by Cruickshank Company was the offer of \$15,000.00.

In the petition for an order to show cause [R. 22], the Appellee offered to do equity in connection with the acquiring of the sprinkler contract. It is to be noted

that Appellee did not appeal from the findings of fact and conclusions of law of the referee in the instant case. However, the Court of its own motion determined that the amount to be received by the Appellants for the sprinkler contract was not to be the purchase price, to wit, \$15,000.00, but the sum of \$10,000.00. As stated in Appellants' Opening Brief, there are no facts that warrant the court to reduce the amount to be paid the Appellants from \$15,000.00 to \$10,000.00, and there is no law that justifies the court in making any such reduction.

The law is well settled that when an officer acquires a claim against a corporation under circumstances which render it inequitable for him so to do and where the corporation is *insolvent*, the director is precluded from recovering more than he paid for the claim. Without arguing the facts of the instant case, it is clear that there is no law that would justify the court in penalizing the purchasers of a claim and indirectly awarding punitive damages. See *Bonney v. Tilley*, 109 Cal. 346, and *Phillips v. Sanger Lbr. Co.*, 130 Cal. 431, in both of which cases it has been settled that the director of a corporation is entitled to a restoration of the consideration or moneys paid by the director in acquiring an obligation against the corporation where the circumstances were such that the director had no right to make a profit out of the particular transaction. In the case of *Bonney v. Tilley*, *supra*, it is even held that the officer of a corporation acquiring a claim against the corporation is not only entitled to receive back the consideration paid by him for the claim but is also entitled to interest.

Appellee has cited no law which would in any manner substantiate its contention that the District Court had

the right to make any judgment holding the purchasers of claims against a corporation must turn over these obligations to the corporation at less than the purchase price of the same, irrespective of any alleged fraud or inequities in connection with the transaction.

Summary and Conclusion.

Appellants maintain, and have shown in their Briefs herein, that the order appealed from is void and should be annulled and set aside for the following reasons:

(a) There was no jurisdiction ever invoked to sustain said proceedings, because:

(1) The involuntary petition was *not signed or filed by any qualified unsecured* creditors.

(2) *No act of bankruptcy* was stated therein.

(b) The matter tried was not the subject matter of a summary proceeding, and the debtor could not institute the same.

(c) The alleged debtor was *never adjudicated* a bankrupt.

(d) The petition was *defective and not signed or filed by any qualified creditors and conferred no jurisdiction*; accordingly, all proceedings taken thereunder were void and of no effect.

(e) The dismissal of the involuntary petition carried with it everything ancillary thereunder.

(f) Such proceedings were in violation of the stipulation of the parties, approved by the Court, and no such proceedings should have been allowed until, if and after, there had been an adjudication.

(g) There was error in refusing a creditor the right to intervene and in denying his motion to dismiss.

(h) The evidence does not sustain the findings.

(i) The Court also erred in reducing, on its own motion, and in the absence of appeal, the referee's finding with reference to the repayment of \$15,000.00.

We respectfully submit that the order (of May 27, 1946) appealed from should be reversed and set aside.

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